IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-70007

JEDIDIAH ISAAC MURPHY,

Petitioner-Appellant,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(Filed Aug. 24, 2018)

Before: KING, DENNIS, and COSTA, Circuit Judges.

KING, Circuit Judge.

Jedidiah Isaac Murphy was convicted and sentenced to death by a Texas jury for the capital murder of Bertie Cunningham. After unsuccessfully pursuing state appellate and habeas remedies, Murphy brought a federal habeas petition, which eventually was denied. We recently granted Murphy a certificate of appealability to appeal the denial of two of his federal

habeas claims. *See Murphy v. Davis*, No. 17-70007, 2018 WL 1906000, at *1 (5th Cir. Apr. 20, 2018) (per curiam). Murphy's first claim alleges that his trial counsel was constitutionally deficient during the penalty phase of trial by failing to correct a potentially misleading impression created by one of his experts. Murphy's second claim alleges the State suppressed material impeachment evidence of a pretrial conversation between a State witness and the lead prosecutor in his case. Upon full review, we agree with the district court that these claims are either procedurally barred or meritless. We AFFIRM.

I.

A.

After robbing 80-year-old Bertie Cunningham at gunpoint, Jedidiah Isaac Murphy forced her into the trunk of her own car and shot her in the head. He then drove around with her body in the trunk, using her ATM card and credit cards to buy beer and liquor. Murphy was soon arrested. He admitted to the shooting and led police to the creek where he had dumped Cunningham's body. Later at the police station, he wrote and signed a statement claiming that he accidentally shot Cunningham while forcing her into her own trunk.

In June 2001, a Texas jury convicted Murphy of capital murder. The State of Texas sought the death penalty. During the penalty phase of the trial, the sides

clashed over the future threat to society Murphy would pose if allowed to live.

In particular, the severity of Murphy's history of violence was a point of contention. To demonstrate he had such a history, the State submitted Murphy's record of theft convictions. A responding officer also testified for the State about a domestic-abuse call involving Murphy and his girlfriend. The officer said that when he entered Murphy's home, the girlfriend had a bloody nose and Murphy had a knife. The officer subdued Murphy with pepper spray. Another State witness said that Murphy pulled a gun on her at a high school party. He put the gun to her head, asked if she was afraid to die, and held it there for a minute. One of Murphy's coworkers also testified for the State. She claimed that Murphy talked about having access to guns, bragged about shooting people, and threatened to "knock [her] fucking head off." The woman was so frightened that she quit her job and reported Murphy to the police.

Along with this, the State tried to implicate Murphy in a three-year-old kidnapping case. Sheryl Wilhelm testified for the State that, three years before the Cunningham killing, a man briefly kidnapped her and then stole her car. After seeing a TV news report on Cunningham's murder featuring Murphy's photo, Wilhelm called the police to report Murphy as her kidnapper. She identified Murphy during a pretrial hearing and then again at trial. Wilhelm also testified at trial that she identified Murphy in a police-constructed photo lineup. The detective who conducted the photo lineup testified that Wilhelm's "was one of the better

photo" identifications he ever had. According to the detective, Wilhelm said "she was virtually sure that that was the guy who abducted her."

Murphy attacked Wilhelm's identification in a few ways. He called a psychologist who testified that Wilhelm's memory was tainted by the photo of Murphy she saw on the news. The psychologist also pointed out prominent differences between a composite sketch, made just a week after the kidnapping, and the press-released photo of Murphy. And the psychologist added that the photo lineup was unfairly constructed; obvious differences between the mugshots reduced the odds of selection from one-in-six to one-in-three. Murphy also put on an alibi defense. Wilhelm said she had been kidnapped, escaped, and had her car stolen at 11:30 a.m. in Arlington, Texas. The day after her kidnapping, Wilhelm's car was found in Wichita Falls, Texas. In the car, the police found documents belonging to another woman. That woman had been assaulted and had her purse stolen in Wichita Falls at 8:24 p.m. on the day of Wilhelm's kidnapping. Also on the same day, Murphy clocked in for his night shift at 11:54 p.m. in Terrell, Texas. Murphy's counsel argued that Murphy did not have time to kidnap Wilhelm in Arlington, rob the other woman in Wichita Falls, and make it to work in Terrell.

The trial did not just focus on Murphy's dangerousness. Murphy claimed that mitigating circumstances reduced his moral blameworthiness. To make his case, Murphy called, among others, a psychologist named Dr. Mary Connell. Dr. Connell had interviewed

Murphy three times, interviewed Murphy's family and other acquaintances, and reviewed his records. From this, Dr. Connell was able to testify in detail about Murphy's background. She explained that Murphy's father was an abusive alcoholic. By seven, both of Murphy's parents had abandoned him and he was put in the foster-care system. In the system, Murphy went through five families. His first adoptive father hit and screamed at him. His second adoptive family broke up. As Murphy grew older, he became an alcoholic and he started to feel like he was falling into his father's pattern of abuse. He attempted suicide and sought out psychiatric treatment for depression, psychosis, and anxiety.

Drawing on what she had learned, Dr. Connell testified that Murphy "is generally described by people as a warm, outgoing, loving kind of person." Dr. Connell added that Murphy expressed remorse for his crime and that "he talked about Ms. Bertie Cunningham in almost a reverent or awed way." Based on his early childhood abuse and abandonment, Murphy became self-loathing. Per Dr. Connell, Murphy's drinking was driven by "a genetic predisposition," a desire to temporarily feel better about himself, and "his identification with his father." Like his father, he saw himself as nothing but a worthless drunk. Dr. Connell did admit, however, that Murphy is "unpredictable," "moody," and "impulsive"—behaviors that intensify when he is drinking. According to Dr. Connell, Murphy is intermittently violent. "[H]e could maintain an even keel for a period of a month or two . . . but then something would

set him off and he would go on another binge, get aggressive, angry, loud, belligerent, and things would spiral downward and out of control."

Dr. Connell also testified that she gave Murphy two tests: the Minnesota Multiphasic Personality Inventory-II (MMPI-2) and the Millon Clinical Multiaxial Inventory-III (MCMI-3). As background, the MMPI-2 and MCMI-3 consist of 567 and 175 true-false questions, respectively. For both tests, the subject's answers are fed through a database. A computer program, using group statistical data, then returns a profile on the subject. Upon request, an interpretative report—which supplies further hypotheses about the subject—may also be returned. Per Dr. Connell, the MMPI-2 is the "flagship" personality-assessment test and the MCMI-3 assesses the subject for character problems.

Murphy's MMPI-2 profile and interpretative report showed, according to Dr. Connell, that Murphy exhibited signs of depression, anxiety, physical ailments, and paranoid thoughts. At first, Dr. Connell thought Murphy might be exaggerating his symptoms—a fact suggested by elevated results on the MMPI-2's "lie scale." But when she looked at his answers and compared them to the interviews they had, she concluded Murphy was not lying. Turning to Murphy's MCMI-3, the test result's suggested, per Dr. Connell, that Murphy was "deeply depressed with an agitated edge." His thoughts, according to Dr. Connell, would shift between suicide, hopelessness, and futility "to occasional outbursts of bitter discontent or irrational demands."

Murphy's results on both tests, said Dr. Connell, would normally prompt referral for psychiatric consultation and probably indicate a need for medication.

It is important here to note that neither test is designed to give a final interpretation of the test subject. Rather, as explained by the interpretative reports themselves (which were introduced by the State into evidence) and by Dr. Connell, the tests render hypotheses. It is also important to note that no psychologist, besides Dr. Connell, was directly involved in administering or interpreting Murphy's MMPI-2 and MCMI-3. The tests instead draw on computer algorithms constructed by other psychologists. As Dr. Connell explained on direct, she gave the tests to Murphy and "scored the results with a computer system" which looked at how he "compared to other people in a clinical setting."

Despite this, when cross-examined, Dr. Connell agreed that Dr. James Butcher—"probably the leading expert in the country on the interpretation of the MMPI"—had "interpreted" Murphy's MMPI-2. Strictly speaking, Dr. Butcher had only developed the computerized interpretative system which read Murphy's answers and generated an interpretative report. Dr. Butcher's name therefore appeared on the interpretative report for the MMPI-2. But Murphy had never interacted with Dr. Butcher, and Dr. Butcher never reviewed Murphy's MMPI-2 answers, profile, or interpretative report. That distinction did not stop the State from referring to the MMPI-2 interpretative report "as the report of Dr. James Butcher." Nor did it stop Dr.

Connell from agreeing that the hypotheses contained in MMPI-2 report were the "statements of Dr. Butcher."

The State proceeded to read off some of the MMPI-2 interpretative report's unfavorable hypotheses, referring to them as Dr. Butcher's "statements." Per the State, Dr. Butcher stated that Murphy exaggerated his symptoms and responded to the last section of the MMPI-2 "either carelessly, randomly, or deceitfully, thereby invalidating that portion of the test." The State continued, reading off that Murphy "has serious problems controlling his impulses and temper," "loses control easily," and may be "assaultive." Murphy, according to the parts read aloud, "manipulates people" and lacks "genuine interpersonal warmth." According to the report, Murphy matches the profile of a Megargee Type H offender, a seriously disturbed inmate type. Inmates with Murphy's profile will, per the report, "not seek psychological treatment on their own" and are "poor candidates for psychotherapy."

Dr. Connell pushed back on the State's use of the interpretive report. She clarified that the report only gave hypotheses, one of which "we know . . . is wrong"; Murphy had sought psychological treatment on his own. She directed the jury to the beginning of the report, which said that the offered interpretation is not meant to be final and that "interview, observation, and history should be taken into account." She also explained that based on her interviews with Murphy, she did not believe he was exaggerating his symptoms. She did not, however, clarify that it was only Dr. Butcher's

computer program—not the doctor himself—that read Murphy's 567 true-false answers.

The State moved to the MCMI-3 interpretative report, calling it the "report produced by Dr. [Theodore] Millon" (again, without clarification from Dr. Connell). Dr. Millon is an authoritative figure on the MCMI-3, and his name is affixed to the MCMI-3 interpretative report. The prosecution elicited from Dr. Connell that through the MCMI-3, Dr. Millon himself had stated that Murphy "may have reported more psychological symptoms than objectively exist," and Murphy has "a moderate tendency toward self-deprecation and a consequent exaggeration of current emotional problems." Dr. Connell again clarified that she did not "know that these results should be considered definitive for diagnosis."

On redirect, the defense did not ask Dr. Connell if Drs. Butcher and Millon were personally involved with Murphy in any way. Instead, counsel had Dr. Connell explain what use she made of the tests and interpretative reports. Dr. Connell explained that she administered the tests to help her "gain an understanding of [Murphy's] view of his own functioning and an understanding of how he compares to other people in similar situations." Dr. Connell added, "I didn't administer them for the diagnosis or treatment of a disorder, but just to give myself a sort of objective and normative feel for who it was that I was attempting to understand." Counsel elicited that Dr. Connell's ultimate conclusions about Murphy were informed by the tests and reports, and that despite the reports, she thought

Murphy was truthful, was not blaming others, and was "suffering enormously over the guilt for what he had done." The defense also had Dr. Connell read the parts of the reports the prosecution "left out." Dr. Connell read off the reports that Murphy's alcohol abuse was caused by frustration and disappointment, that his inappropriate behavior manifests when drinking, and that he has genuine feelings of guilt and remorse.

During opening summation, the State emphasized the "chilling" results of Murphy's MMPI-2 and MCMI-3, which it invited the jury to read. Specifically, the State pointed out that Murphy's profile matched that of a Megargee Type H offender—"one of the most seriously disturbed inmate types" for whom "[a]djustment to prison appears to be difficult." During its summation, the defense did not mention the MMPI-2 or MCMI-3. During the State's rebuttal summation, it returned to the tests:

> You know, all you have to do if you really have a question about what this guy's going to do in prison, if you look at the defense's own expert—now, these are not people that the State of Texas hired on his behalf, but you look at Dr. James Butcher who the defense hired and this report was brought out on cross-examination. And you remember what Dr. Butcher said? You know, he's the doctor, I suppose, who's not opposed to the death penalty. Here is what he says about the defendant. He says this man right here is a poor candidate for psychotherapy. Individuals with his profile are not very amenable to changing their

> behavior. You have a litany illustrating his behavior. He goes on to say this, they tend to be quite aggressive. And finally, if you have any question about what this man is all about in a confined setting, adjustment to prison appears to be difficult for them. Those aren't my words, ladies and gentlemen. That's not some expert that we hired. That's Dr. James Butcher hired by the defense to look at the tests administered to this man over here. So even if I look at that set alone, which each and every one of you told us you weren't going to do, but even if you do that, I mean, their own expert says, that ain't going to fly in this case. This man is going to be a danger wherever he's going to be.

The defense did not object to this line of argument.

The jury found that Murphy was a continuing threat to society and there were insufficient mitigating circumstances to justify life in prison. *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2. Based on these two findings, Murphy was sentenced to death.

Murphy's conviction and sentence were affirmed on direct appeal. *Murphy v. State*, 112 S.W.3d 592, 595 (Tex. Crim. App. 2003). Likewise, his first state habeas application was denied. *Ex parte Murphy*, No. WR–70,832–01, 2009 WL 766213, at *1 (Tex. Crim. App. Mar. 25, 2009) (per curiam) (not designated for publication).

B.

In 2009, Murphy's new lawyer cold called Sheryl Wilhelm and asked her what happened during the photo lineup where she identified Murphy as her kidnapper. Wilhelm said that when she identified Murphy, she told the detective: "This is him. This looks a lot like him, and I'm pretty sure it's him." She also stated that: "You know, nobody's ever 100 percent sure. . . . I'm talking about anything in this life but, I mean, to me, it was him. I mean, 95 to 100 percent it was him." Wilhelm also disclosed to Murphy's lawyer that the lead prosecutor in Murphy's case came to her house before trial. At her house, Wilhelm said that she asked the prosecutor "was that the guy?" He responded, "Yes." Following up on what she meant, Murphy's lawyer asked Wilhelm: "when you asked [the prosecutor] if you got the right guy, and he said that you did, it confirmed in your mind the accuracy of your identification?" Wilhelm responded, "Right." Murphy's lawyer then asked if the prosecutor "hadn't told you that, would you have retained any, perhaps, uncertainty about it?" Wilhelm responded, "No." "I mean, I knew it was him. Yeah I knew it was him. I think that happened. I swear it's been so long ago, but I'm pretty sure that I asked him, 'Was this the guy?' . . . And he nodded his head so, I don't know."

Soon after this phone exchange, Murphy filed a federal habeas petition. The district court stayed the proceedings to give Murphy time to exhaust three sets of claims in the state system: (1) suppression of

evidence impeaching Wilhelm's identification,[1] (2) ineffective assistance of trial counsel at the guilt phase, and (3) ineffective assistance of trial counsel at the penalty phase.

Following the stay, Murphy filed a second state habeas application. The Texas Court of Criminal Appeals (TCCA) dismissed Murphy's two ineffectiveness claims as abuses of the writ. *Ex parte Murphy*, No. WR-70,832-02, 2010 WL 3905152, at *1 (Tex. Crim. App. Oct. 6, 2010) (per curiam) (not designated for publication). With respect to Murphy's suppression claim, the TCCA remanded to the convicting trial court with instructions to determine whether the claim was procedurally barred and, if not, whether it had merit. *Id.*

The state trial court held an evidentiary hearing where it heard testimony from Sheryl Wilhelm, the detective who administered the photo lineup, the lead prosecutor, and Murphy's lead trial counsel. At the hearing, Murphy's counsel elicited from Wilhelm that, at the pretrial interview, the following occurred: Wilhelm asked the lead prosecutor whether she "had identified the right man in the photo spread," the prosecutor told her she had, and this confirmed in her mind the accuracy of her identification of Murphy. On cross-examination, Wilhelm testified that, in fact, she had asked the lead prosecutor whether she had identified the same person who was arrested for Bertie

[1] Murphy also raised a related prosecutorial-misconduct claim based on use of false testimony. He no longer presses this claim.

Cunningham's murder, not whether her identification of the person who kidnapped her was correct. Wilhelm said she understood the distinction between the two concepts. She added that when she made her in-court identification she was thinking about the person that [sic] who kidnapped her.

When examined at the evidentiary hearing, the lead prosecutor denied that he confirmed the accuracy of Wilhelm's photo-lineup identification. He said that as best he could recall, he told Wilhelm that he was "there to prosecute a capital murder" and that he believed "that the same person who had kidnapped [Wilhelm] had abducted and killed [Cunningham]." He swore that he "would have done everything he could not to inform her about the validity of her photo identification." He maintained that he did not believe that he ever told Wilhelm "I believe you have the right person." When asked if he thought he might have affirmatively responded to the question "did I pick the right guy out of the photo spread?" he responded, "No. I don't recall it being in response to that. I think that would've been in response to do you think that you have the same person who kidnapped me."

After the hearing, the trial court found that Murphy's claim should be dismissed as an abuse of the writ and alternatively denied as meritless. To do so, it entered two sets of factual findings: one related to the procedural bar and the other related to the merits. With respect to the procedural bar, the trial court found that Murphy reasonably could have ascertained the factual basis for his suppression claim before his

first state habeas application was filed by asking Wilhelm questions during her pretrial or trial cross-examination. With respect to the merits, the court found that Wilhelm was not certain what was said at the pretrial interview, that the "prosecutor purposefully avoided doing things that might influence or taint Wilhelm's identification," and that the pretrial conversation "would not have altered Wilhelm's courtroom identification." The court added that the defense presented more credible attacks on the identification than the pretrial interview and that the "best evidence" of future dangerousness "was the primary offense"—that is, Cunningham's murder. Based on the trial court's findings, the TCCA concluded that Murphy's application was an abuse of the writ and dismissed his application "without considering the merits of the [his] claims." *Ex parte Murphy*, No. WR-70,832-02, 2012 WL 982945, at *1 (Tex. Crim. App. Mar. 21, 2012) (per curiam) (not designated for publication).

Murphy returned to federal court and raised the three sets of now exhausted claims, among others. The district court denied Murphy relief on all of his claims, finding them procedurally barred and alternatively meritless. It also denied his request for an evidentiary hearing. Murphy then sought a certificate of appealability (COA) from us to appeal all three sets of claims. We obliged him on parts of two separate claims:

> (1) Ineffective assistance of trial counsel at the penalty phase arising from his counsel's failure to correct a false impression created by Dr. Connell; and

(2) Suppression of evidence, specifically the pretrial conversation where the lead prosecutor allegedly confirmed to Wilhelm that she got the right guy.[2]

Murphy, 2018 WL 1906000, at *4-5.

Our task now is to decide whether either claim justifies reversal of the district court. We conclude that neither does.

II.

Murphy claims that his trial counsel was constitutionally ineffective at the penalty phase. The specific defect in counsel's representation was, according to Murphy, not eliciting from Dr. Connell on redirect that it was Drs. Butcher's and Millon's computer algorithms—not the doctors themselves—that generated the damaging MMPI-2 and MCMI-3 interpretative reports.[3] He asserts that the State weaponized any jury

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[2] Originally, Murphy requested a COA based on suppression of evidence *Brady v. Maryland*, 373 U.S. 83 (1963), as well as use of false testimony under *Giglio v. United States*, 405 U.S. 150 (1972). We previously noted that *Napue v. Illinois*, 360 U.S. 264 (1959), "is a better fit for Murphy's claims," as he alleged "the use of false testimony, not merely the failure to disclose contradictory evidence." *Murphy*, 2018 WL 1906000, at *4 n.1. On appeal, Murphy presses neither *Giglio* nor *Napue* as a basis for relief. Any such argument is therefore forfeited. *See United States v. Scroggins*, 599 F.3d 433, 446-47 (5th Cir. 2010); *see also* Fed. R. App. P. 28(a)(8)(A).

[3] Murphy does not separately claim that counsel was deficient for failing to object to the State's summation. The argument

confusion over the reports' origins by stressing in summation that leading psychologists, hired by the defense, had concluded that Murphy could not be rehabilitated and would be dangerous in prison. Murphy also claims he needs an evidentiary hearing to develop whether counsel knew of the reports' origins and, if so, what reason they may have had for not exposing them. We agree with the district court that no evidentiary hearing is needed and this claim is meritless.[4]

A.

Murphy's ineffectiveness claim is governed by the familiar *Strickland* standard. To prevail, Murphy must show: (1) that his trial counsel's performance was deficient, and (2) that the deficient performance resulted

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is therefore forfeited. *See Scroggins*, 599 F.3d at 446-47; *see also* Fed. R. App. P. 28(a)(8)(A).

[4] Murphy did not raise an ineffectiveness claim in his original state habeas application. When he raised this ineffectiveness claim in his second application, the TCCA dismissed it as an abuse of the writ—an adequate and independent state ground. *See Canales v. Stephens*, 765 F.3d 551, 566 (5th Cir. 2014). Murphy's claim is therefore procedurally defaulted, *see id.*, and not subject to the strictures of § 2254(d), which requires an adjudication on the merits, *see* 28 U.S.C. § 2254(d). But instead of deciding if Murphy can overcome his procedural default via *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), we will cut straight to the merits to deny his claim. *See Bell v. Cone*, 543 U.S. 447, 451 & n.3 (2005) (declining to consider whether the court of appeals correctly held that the petitioner had not defaulted and citing § 2254(b)(2) for the proposition that a habeas application "may be denied on the merits, notwithstanding a petitioner's failure to exhaust in state court").

in prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Strickland's first prong "sets a high bar." *Buck v. Davis*, 137 S. Ct. 759, 775 (2017). "To demonstrate deficient performance, the defendant must show that, in light of the circumstances as they appeared at the time of the conduct, 'counsel's representation fell below an objective standard of reasonableness' as measured by 'prevailing professional norms.'" *See Rhoades v. Davis*, 852 F.3d 422, 431-32 (5th Cir. 2017) (quoting *Strickland*, 466 U.S. at 687-88). We "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689).

To satisfy *Strickland*'s second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. We must "consider *all* the relevant evidence that the jury would have had before it if [trial counsel] had pursued the different path." *Wong v. Belmontes*, 558 U.S. 15, 20 (2009) (per curiam).

We will consider both *Strickland* prongs, reviewing the district court's conclusions of law de novo and factual findings for clear error. *See Woodfox v. Cain*,

609 F.3d 774, 788-89 (5th Cir. 2010). But before we do so, we must decide whether the district court's refusal to grant Murphy an evidentiary hearing was proper. We determine that it was.

B.

Federal courts faced with habeas petitioners' discovery requests have, in some circumstances, a duty "to provide the necessary facilities and procedures for an adequate inquiry." *See Gibbs v. Johnson*, 154 F.3d 253, 258 (5th Cir. 1998) (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969)); *see also Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997). This is the case when "specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *See Murphy v. Johnson*, 205 F.3d 809, 814-15 (5th Cir. 2000) (alteration in original) (quoting *Gibbs*, 154 F.3d at 258). But we need not allow "fishing expeditions." *See Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994).

When a habeas petitioner requests an evidentiary hearing, district courts have discretion over whether to grant one. *See Schriro v. Landrigan*, 550 U.S. 465, 468 (2007).[5] A district court does not abuse its discretion when denying an evidentiary hearing if it had

[5] This of course assumes that the availability of an evidentiary hearing is not barred by 28 U.S.C. § 2254(e)(2). As we conclude the district court did not abuse its discretion in denying an evidentiary hearing, we do not consider whether it would be barred from doing so by statute.

"sufficient facts before it to make an informed decision on the merits." *See McDonald v. Johnson*, 139 F.3d 1056, 1060 (5th Cir. 1998). For instance, no abuse of discretion occurs when, assuming "the truth of all the facts" the petitioner seeks "to prove at the evidentiary hearing," we are confident that "he still could not be granted federal habeas relief." *Schriro*, 550 U.S. at 481.[6]

Murphy argues that the district court should have granted him an evidentiary hearing. Such a hearing would, according to Murphy, reveal whether trial counsel were aware that Drs. Butcher and Millon did not evaluate his test answers and did not directly author the reports. If counsel were not aware, then, per Murphy, they could not have strategically decided not to correct any false impression. And if they were aware, then exploration of their decision not to expose the prosecutor's misleading framing would be needed to determine whether their decision making was strategically sound.

Contra Murphy, we conclude that an evidentiary hearing is not necessary. To reach our conclusion, we proceed based on the assumption that a hearing would

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[6] Murphy argues that a federal evidentiary hearing is *required* because the state courts did not allow him to develop the facts needed to support his ineffectiveness claim. But he cites nothing showing that a lack of record development before the state courts entitles him to a federal evidentiary hearing. *See Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016) ("[W]e decline to hold that *Martinez* mandates an opportunity for additional fact-finding in support of cause and prejudice.").

show what Murphy wants—that trial counsel did not know the MMPI-2's and MCMI-3's origins.[7] *See id.* Proceeding with this favorable assumption, we are still confident Murphy could not show deficiency or prejudice.

1.

Counsel did not render deficient performance, whether they knew of the MMPI-2's and MCMI-3's origins or not. Broadly stated, counsel "has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing." *Strickland*, 466 U.S. at 688. In preparing for the penalty phase of a death penalty trial, "counsel must either (1) undertake a reasonable investigation or (2) make an informed strategic decision that investigation is unnecessary." *See Charles v. Stephens*, 736 F.3d 380, 389 (5th Cir. 2013). "In other words," counsel must "make reasonable investigations" or "a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. When the omission alleged is

[7] If the hearing revealed that counsel knew of the MMPI-2's and MCMI-3's origins, Murphy's case would be even weaker. If counsel was aware, we must presume that the omission on redirect was done "for tactical reasons rather than through sheer neglect." *See Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). Indeed, we must "affirmatively entertain possible 'reasons . . . counsel may have had for proceeding as they did.'" *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011) (quoting *Pinholster v. Ayers*, 590 F.3d 651, 692 (9th Cir. 2009) (Kozinski, C.J., dissenting)). In this case, counsel could reasonably narrow to scope of her redirect to avoid "shift[ing] attention to esoteric matters" or "distract[ing] the jury" from other, stronger points. *See Richter*, 562 U.S. at 108.

failing to investigate something in particular, we look at "the known evidence" and whether it "would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Working through counsel's investigation, what they learned, and choices they made demonstrates their competence.

In an affidavit submitted at the behest of Murphy's current counsel, Murphy's lead trial counsel identified a key constraint she faced: "regardless of the interpreter of the tests, the results were what they were." Counsel understood that most of their evidence was going to be "double-edged"—meaning it was both mitigating and showed Murphy's dangerousness. Counsel calculated that Dr. Connell's testimony about Murphy's upbringing and problems it caused in his life might lead the jury to "weigh in more heavily on mitigation instead of aggravation."

At trial, the defense executed this mitigation-focused strategy. Dr. Connell's testimony painted a sympathetic picture of Murphy. She established that, as a child, Murphy was abused, abandoned, and mistreated. To cope with feeling unlovable, Murphy drank. Doing so, he started to fall into the same pattern of abuse his father displayed. This, admittedly, meant that Murphy was intermittently violent when drinking and could "spiral downward and out of control." But after, Murphy would express genuine remorse and guilt for his wrongs, including killing Bertie Cunningham. On cross-examination, counsel watched as their own expert—who had administered the tests and reviewed the interpretive reports—agreed with the State's

characterization of the interpretative reports as Dr. Butcher's and Millon's. Counsel also watched Dr. Connell push back in a different way—pointing out that the reports only generated hypotheses. On redirect, counsel pressed forth with their mitigation-focused strategy while also countering the prosecution's use of the MMPI-2 and MCMI-3. Counsel elicited that the tests' reports had a limited purpose and drew out the reports helpful parts. Counsel had Dr. Connell point out that the reports indicated that Murphy's alcoholism was a product of self-resentment and guilt. And counsel elicited that Dr. Connell's sympathetic conclusions about Murphy were drawn, in part, from the reports.

In light of counsel's selected mitigation-focused strategy and their known counter to the interpretative reports, it was reasonable not to investigate the extent of Drs. Butcher and Millon's involvement. Figuring out this single detail about the reports might "distract[] from more important duties," *see Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam), especially because, as counsel explained, the reports "were what they were." We must also be wary of "the distorting effects of hindsight." *See Strickland*, 466 U.S. at 689. Looking backward, we can see the precise way the State weaponized the reports in rebuttal summation. It certainly would have been optimal for the defense to have preempted the State's eventual spin. But it was not obvious beforehand that the State would go down this path—especially in light of Dr. Connell's repeated emphasis that the reports only gave hypotheses. *Cf.*

Maryland v. Kulbicki, 136 S. Ct. 2, 4-5 (2015) (per curiam) (noting that lawyers generally need not "go 'looking for a needle in a haystack,'" especially "when they have 'reason to doubt there is any needle there'" (quoting *Rompilla v. Beard*, 545 U.S. 374, 389 (2005))). And in any event, counsel's performance need not be optimal to be reasonable. *See Richter*, 562 U.S. at 104. Murphy was entitled to "reasonable competence, not perfect advocacy." *See Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam).

Even more vitally, counsel was entitled to rely on Dr. Connell to alert her to the potential misapprehension over Drs. Butcher and Millon's involvement. Of course, hiring an expert and having her testify does not give counsel license to "completely abdicate . . . responsibility." *See Turner v. Epps*, 412 F. App'x 696, 704 (5th Cir. 2011) (per curiam).[8] But "counsel should be able to rely on that expert to alert counsel to additional needed information or other possible routes of investigation." *See id.* Here, Dr. Connell repeatedly failed to challenge the State's framing regarding Drs. Butcher and Millon's involvement. Dr. Connell's failure in this regard stands out, given her push back on other issues. In light of this, counsel was entitled to "rely upon the objectively reasonable evaluations and opinions of" Dr. Connell. *See Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016) (quoting *Smith v. Cockrell*, 311 F.3d 661, 676-77 (5th Cir. 2002), *overruled on other grounds by*

[8] As *Turner* is unpublished, we cite it as "persuasive authority." *See United States v. Torres-Jaime*, 821 F.3d 577, 582 (5th Cir. 2016).

Tennard v. Dretke, 542 U.S. 274 (2004)). "Without a red flag . . . it is too much to insist that counsel second-guess her" expert's testimony. *See (Patrick) Murphy v. Davis*, No. 17-70030, 2018 WL 2945900, at *12 (5th Cir. June 11, 2018) (per curiam).[9]

Assuming what Murphy seeks to prove, trial counsel still would not have rendered deficient assistance. Counsel made an informed strategic choice to adopt a mitigation-focused strategy, lessening the need to counter the State's potential spin on the reports. Counsel also already discovered a convincing counter to any such spin. Plus, counsel's expert, whom they were entitled to reasonably rely upon, did not alert them to any issues. And it was not prospectively apparent what any further investigation would turn up or what its value would be. Whether counsel knew of the test's origins or not, their overall performance would still fall "within the 'wide range' of reasonable professional assistance." *See Richter*, 562 U.S. at 104.

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[9] Murphy also appears to argue that counsel failed him by not preparing Dr. Connell to testify. Certainly, failing to prepare a witness may constitute deficient assistance. *See, e.g.*, *Bemore v. Chappell*, 788 F.3d 1151, 1163 (9th Cir. 2015) (holding that it was deficient performance when counsel's only preparation of a crucial alibi witness was meeting with him the night before the witness took the stand); *Harris v. Thompson*, 698 F.3d 609, 640 (7th Cir. 2012) (deficient to totally fail to prepare a crucial, six-year-old witness for his testimony); *Alcala v. Woodford*, 334 F.3d 862, 890 (9th Cir. 2003) (deficient to call a witness without even interviewing him). But Murphy cites no case even remotely analogous to the one before us. We cannot conclude that counsel was deficient because they did not fully prepare an expert to testify on the intricacies of tests the expert administered.

2.

Murphy also falls short on the prejudice prong—a problem an evidentiary hearing cannot change. To show prejudice, Murphy must perform a delicate balancing act. He must show that the jury gave a good deal of weight to the reports' hypotheses. He must also show that exposing the reports' true origins would then meaningfully change that assessment. This is a tough balance to strike. The jury heard that the reports only gave hypotheses not conclusions. The jury heard that one of those hypotheses—that Murphy would not seek psychological treatment on his own—was conclusively wrong. And it heard that another hypothesis fell apart after Dr. Connell's interviews. Assuming, as we must, that the jury fairly weighed this evidence, it would be difficult for it to place much faith in the reports, regardless of how they came to be. *Cf. Strickland*, 466 U.S. at 695 (holding that the prejudice inquiry assumes "that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision" and that the inquiry does "not depend on the idiosyncra[s]ies of the particular decisionmaker").

But if, despite all this, the jury was still inclined to give weight to the reports, revealing the degree of Drs. Butcher and Millon's involvement (or lack thereof) would not change much. It is unlikely that the jury would put less stock in the reports based on the realization that a computer, not a person, scored a *true-false* exam. The jury still would have heard that computer programs devised by leading psychologists had

generated disturbing hypotheses about Murphy. And the reports would retain an imprimatur of neutrality because Murphy's expert administered the tests and computer programs returned the results. Given all this, Murphy cannot prevail. It is hard to conclude that the jury gave the reports much weight at all. It strains credulity to believe that, had the jury given the reports weight, merely clearing up that the tests were graded by computer, not hand, would change its opinion.

In any event, no matter how the jury viewed the reports, the historical evidence of Murphy's dangerousness was far more damaging. The jury heard that Murphy kidnapped an elderly woman, shot her point blank in the head, drove around with her body in the trunk as he used her credit cards, and eventually dumped her in a creek. It heard that Murphy had put a gun to the head of a woman at a high school party and asked if she was afraid to die. It heard that a police officer had to subdue him while he was wielding a knife after he hit his girlfriend. It heard that he had repeatedly threatened to shoot his coworker. It heard from Dr. Connell that Murphy was intermittently violent. Of course, it might be "conceivable" that the jury was swayed by a misapprehension over Drs. Butcher and Millon's involvement. *See Richter*, 562 U.S. at 112. But looking over "*all* the relevant evidence that the jury would have had before it," *see Belmontes*, 558 U.S. at 20, the chances of a different result are not "substantial," *see Richter*, 562 U.S. at 112.

* * *

As it stands, the record does not show deficient performance or prejudice. And assuming what Murphy seeks to prove at an evidentiary hearing—that counsel was unaware of the reports' origins—Murphy would still fail to make out a case for deficient performance. Plus, Murphy does not even argue that a hearing would save his case for prejudice. Thus, the district court did not abuse its discretion by denying Murphy an evidentiary hearing and it properly denied Murphy's *Strickland* claim on the merits.

III.

Murphy's second claim is that the State suppressed evidence that could have been used to impeach Sheryl Wilhelm, the State witness who identified Murphy as her kidnapper. Specifically, he complains that the State did not disclose a pretrial interview between the lead prosecutor and Wilhelm where the prosecutor allegedly confirmed the accuracy of her identification. This conversation, according to Murphy, could have been used to impeach Wilhelm's identification, knocking out a key part of the State's case for future dangerousness. We agree with the district court that this *Brady v. Maryland*, 373 U.S. 83 (1963), claim is procedurally barred and meritless.

A.

Before considering the validity of Murphy's *Brady* claim, we must determine our standard for reviewing

the state trial court's relevant factual conclusions. This requires recitation of some procedural history.

Murphy's *Brady* claim was first raised in his second state habeas application. The TCCA remanded his *Brady* claim to the convicting state court. *Murphy*, 2010 WL 3905152, at *1. The TCCA instructed the trial court to first decide if Murphy's *Brady* claim should be dismissed as an abuse of the writ. *Id.* Specifically, it tasked the trial court with deciding whether the factual basis for the *Brady* claim was ascertainable through the exercise of reasonable diligence before or on the date the original state habeas application was filed. *Id.*; *see* Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(1), (e) (setting forth the abuse of the writ standard). If the *Brady* claim was not abusive, the TCCA instructed the trial court to consider its merits. *Murphy*, 2010 WL 3905152, at *1.

On remand, the state trial court held an evidentiary hearing and eventually issued written findings of fact and conclusions of law. It found Murphy's claim was procedurally barred and meritless. Within the trial court's written ruling, it made two sets of factual findings. The first set supported the conclusion that Murphy's *Brady* claim was available before his first application was filed and so his claim was abusive. The second set supported the conclusion that Murphy's *Brady* claim failed on the merits. Based on these findings, the TCCA, in a brief order, dismissed Murphy's application "as an abuse of the writ without considering the merits of the claims." *Murphy*, 2012 WL 982945, at *1.

Before us, the sides now quarrel over whether both sets of factual findings are entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1).[10] The State contends that both sets are owed deference; Murphy contends that only the first is. We side with the State.

Under 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct" and the "applicant shall have the burden of rebutting" this presumption "by clear and convincing evidence." Unlike § 2254(d), no adjudication on the merits is needed for § 2254(e)(1) to apply. And by § 2254(e)(1)'s terms, it applies to factual determinations "made by a State court," making no distinction between trial and appellate courts. *Cf. Craker v. Procunier*, 756 F.2d 1212, 1213-14 (5th Cir. 1985) (making a similar point about a comparable provision in § 2254's predecessor). We thusly held in *Williams v. Quarterman* that a presumption of correctness attaches to a state trial court's factual findings "even if the state appellate court reached a different legal conclusion when applying the law to those facts." *See* 551 F.3d 352, 358 (5th Cir. 2008) (first citing *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981); then citing *Craker*, 756 F.2d at 1213-14). But there are some circumstances where a state trial court's factual findings will

[10] The parties also clash over whether the strictures of 28 U.S.C. § 2254(d) apply. We do not resolve this issue. *See Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) (holding that federal courts can "deny writs of habeas corpus under § 2254 by engaging in de novo review when it is unclear whether AEDPA deference applies"). Assuming § 2254(d)'s strictures do not apply, Murphy's claim still fails.

not "survive review." *Id.* We have held that trial courts' findings do not survive an appellate court's review "where they were neither adopted nor incorporated into the appellate court's peremptory denial of relief, but instead were directly inconsistent with the appellate court's decision." *Id.* (citing *Micheaux v. Collins*, 944 F.2d 231, 232 (5th Cir. 1991) (en banc) (per curiam)).

In this case, both sets of the state trial court's findings "survive[d] review." *See id.* Regarding the first set—which went to the procedural bar—the TCCA expressly "[b]ased" its abuse of the writ holding on the state court's factual findings. *Murphy*, 2012 WL 982945, at *1. And the second set—which went to the merits—also survived as it was not "directly inconsistent" with the TCCA's dismissal. *See Williams*, 551 F.3d at 358. Indeed, many of the factual findings on the merits bore on whether Murphy's *Brady* claim was previously available and thus was an abuse of the writ.

Murphy tries to distinguish *Williams*. He argues that the TCCA's dismissal without consideration of the merits was directly inconsistent with the trial court's merits findings. Plus *Williams*, per Murphy, states that a presumption of correctness only attaches when the state appellate court "appl[ies] the law to those facts," something the TCCA did not do for the trial court's merits findings. *See id.*

Murphy misreads *Williams*. Neither *Williams* nor any of our caselaw indicates that an appellate court's failure to consider an issue makes its ruling "directly

inconsistent" with the trial court's relevant finding. Plus in this case, inconsistency is particularly difficult to infer; the TCCA did not state which factual findings it based its dismissal upon, and the factual findings on the merits of the *Brady* claim are relevant to whether the claim was an abuse of the writ. And the full passage of *Williams* Murphy cites states that a "trial court's factual findings *are* entitled to a presumption of correctness *even if* the state appellate court reached a different legal conclusion when applying the law to those facts." *Id.* (emphasis added). It does not say that the appellate court *must* apply law to a set of facts for those facts to survive.

Murphy also cites *Jones v. Davis* for support. *See* 890 F.3d 559, 565 (5th Cir. 2018). In *Jones*, we reviewed a fair-trial claim without deference to the state trial court's relevant factual findings. *Id.* There, the TCCA had "expressly rejected all findings and conclusions made by the lower habeas court and decided the case on procedural grounds." *Id.* "[B]ecause the TCCA decided the case on procedural grounds, there was no 'determination of a factual issue made by a State court' to which the federal court could have deferred under § 2254(e)(1)." *Id.*

Jones involved an express rejection of factual findings. *Id.* It therefore aligns with our cases holding that direct inconsistency between a trial court's fact finding and an appellate court's ruling removes the presumption of correctness from the trial court's

finding.[11] *Jones* therefore does not avail Murphy. In this case, unlike in *Jones*, the TCCA did not "expressly reject[ ]" the trial court's findings on the merits. *See id.* Instead, it simply did not consider the merits of Murphy's claim.

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[11] *Compare Craker*, 756 F.2d at 1213-14 (applying a presumption of correctness to the trial court's findings when the TCCA "did not reject the factual findings of the state trial court; it merely held that the facts as found did not entitle [the petitioner] to relief"), *with Micheaux*, 944 F.2d at 232 n.1 (declining to apply a presumption of correctness in favor of the trial court's findings and distinguishing *Craker* on the ground that there the TCCA "*did not reject the factual findings* of the state [trial] court" (alterations in original)); *cf. also Williams*, 551 F.3d at 357-59 (holding that review was de novo when the TCCA expressly found that "some" findings lacked support because it would be "pure speculation" to determine which facts TCCA concluded were and were not supported).

Indeed, *Jones* cited *Williams*, which in turn held that "a state habeas trial court's factual findings do not survive review by the [TCCA] where they [are] neither adopted nor incorporated into the appellate court's peremptory denial of relief, but instead were directly inconsistent with the appellate court's decision." *Williams*, 551 F.3d at 358. In its parenthetical quoting *Williams*, however, *Jones* omitted the second part of this sentence, making the sentence read only that "a state habeas trial court's factual findings do not survive review by the [TCCA] where they [are] neither adopted nor incorporated into the appellate court's peremptory denial of relief." 890 F.3d at 565 n.24 (alterations in original). As we explained previously, the facts of *Jones* do not bring it into conflict with our longstanding precedent. And even if we assume that *Jones*'s half-complete quotation was intended to change the law, one panel "may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court." *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). We are therefore bound by our prior statement of the law in *Williams*.

Accordingly, all the state trial court's express factual findings are owed a presumption of correctness, a presumption Murphy may rebut only with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Not only that, this presumption "also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact." *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001). This standard "is demanding but not insatiable." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

Resolved that § 2254(e)(1) constrains our review of all the state trial court's factual findings, we next turn to the *Brady* claim itself.

B.

To prove his *Brady* claim, Murphy must show three things: (1) the evidence at issue is favorable to the defense, either because it is exculpatory or impeaching, (2) the prosecution suppressed the evidence, and (3) the evidence is material. *See United States v. Brown*, 650 F.3d 581, 587-88 (5th Cir. 2011). Recall, however, that Murphy's *Brady* claim was dismissed as an abuse of the writ by the TCCA, *Murphy*, 2012 WL 982945, at *1, an independent state ground that ordinarily will bar our review, *Moore v. Quarterman*, 534 F.3d 454, 463 (5th Cir. 2008). To overcome his default, Murphy invokes *Banks v. Dretke*, 540 U.S. 668 (2004). "A federal court may consider the merits of a procedurally defaulted claim if the petitioner shows 'cause for the default and prejudice from a violation of federal

law.'" *Canales v. Stephens*, 765 F.3d 551, 562 (5th Cir. 2014) (quoting *Martinez v. Ryan*, 566 U.S. 1, 10 (2012)). Under *Banks*, a petitioner shows "cause" if "the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence." 540 U.S. at 691. To show prejudice, Murphy must demonstrate that "the suppressed evidence is 'material' for *Brady* purposes." *See Rocha v. Thaler*, 619 F.3d 387, 394 (5th Cir. 2010). In effect then, to overcome his procedural default and prevail on the merits, Murphy must establish a valid *Brady* claim. He fails to do so. Even assuming the evidence was suppressed, we conclude it was not material.[12]

Suppressed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 685 (1985). We consider evidence's materiality in light of other suppressed evidence, not merely

[12] The parties quarrel over whether the pretrial conversation could impeach Wilhelm's photo and in-courtroom identification. Murphy argues that exposing the conversation could explain why Wilhelm was confident about her photo identification. And exposing the conversation, according to Murphy, could show that her in-courtroom identification was tainted. The State counters, arguing that the state trial court's factual findings indicate that the conversation did not confirm her photo identification or taint her in-courtroom identification. The State adds that the conversation lacked impeachment value as the jury would naturally suspect that a prosecutor spoke with Wilhelm beforehand and that Wilhelm knew she was called because she had previously identified Murphy. We assume without deciding that the evidence was impeaching, and nevertheless conclude that the evidence was not material.

the probative value of the suppressed evidence standing alone. *See Kyles v. Whitley*, 514 U.S. 419, 436 (1995). "The materiality of *Brady* material depends almost entirely on the value of the evidence relative to the other evidence mustered by the state." *Rocha*, 619 F.3d at 396 (quoting *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004)). "If the evidence provides only incremental impeachment value, it does not rise to the level of *Brady* materiality." *Miller v. Dretke*, 431 F.3d 241, 251 (5th Cir. 2005).

Murphy claims he could have used the conversation to impeach Wilhelm's two identifications: her initial photo identification and her in-courtroom identification. He argues that the jury would believe that the conversation confirmed for Wilhelm the accuracy of her prior photo identification and influenced her later in-courtroom identification. This revelation, according to Murphy, would therefore undermine a key piece of evidence of his future dangerousness.

We disagree. The pretrial conversation was of marginal value to the defense and was cumulative with already presented impeachment evidence. *See Miller*, 431 F.3d at 251. The pretrial conversation could not impeach Wilhelm's photo identification—an identification which occurred *before* the conversation. This is particularly detrimental to Murphy's case for materiality, as the detective who conducted the lineup called it "one of the better photo" identifications he ever had. So, best case for Murphy, the conversation could only impeach Wilhelm's in-courtroom identification. What is more, the conversation would not be very potent

impeachment material. The conversation could be shown to have bolstered Wilhelm's confidence when giving her in-courtroom identification; it could not demonstrate that her memory was tainted or altered. As the state trial court found, the prosecutor did not do things during the pretrial interview that might taint Wilhelm's memory, like showing Wilhelm photos of Murphy, the police composite sketch, or where Murphy would be in the courtroom. Plus whatever confidence boost the pretrial conversation gave Wilhelm would be slight relative [sic] the other suggestive circumstances the defense identified at trial. The defense drew out that: Wilhelm saw Murphy's photo on TV and in the newspapers; Wilhelm's mother told Wilhelm that Murphy looked like the man in the composite sketch; and the photo lineup was unfairly constructed. "[W]hile the defense surely could have used [the pretrial conversation] in its cross-examination of [Wilhelm], it would not have significantly added to the impeachment ammunition that [Murphy]'s counsel already had." *See Cobb v. Thaler*, 682 F.3d 364, 380 (5th Cir. 2012). Finally, as we detailed on Murphy's ineffectiveness claim, the State put on significant other evidence to show Murphy's future dangerousness besides the Wilhelm kidnapping.

The pretrial conversation was not material. Thus, the district court correctly held that Murphy's *Brady* claim was both procedurally defaulted and meritless.

IV.

Before we finish, we must address one more argument from Murphy. Murphy claims that the prejudice from his *Strickland* and *Brady* claims should be considered cumulatively if, considered individually, neither is sufficiently prejudicial. This argument does not avail Murphy.

As an initial matter, Murphy did not raise this argument below, and thus he may not present it on appeal. *See United States v. Scroggins*, 599 F.3d 433, 446-47 (5th Cir. 2010); *see also* Fed. R. App. P. 28(a)(8)(A). In any event, Murphy cannot cumulate the prejudice from his claims because his *Brady* claim is, as we held, procedurally barred. *See Derden v. McNeel*, 978 F.2d 1453, 1458 (5th Cir. 1992) (en banc) (establishing, as a condition for showing cumulative error, that "the error complained of must not have been procedurally barred from habeas corpus review").[13] Moreover, because we have rejected both his alleged errors, "there is nothing to accumulate" and the "doctrine has no applicability." *See United States v. Delgado*, 672 F.3d 320, 344 (5th Cir. 2012) (en banc). Finally, even if we assumed he established error on his claims and amassed the prejudice from both, we would find no cumulative error. For both claims, we concluded that the prejudice arising from the alleged violation itself was slight. Neither violation interacts with the evidence of Murphy's

[13] Murphy does not argue that we may cumulate errors to satisfy the prejudice prong to excuse procedural default, and thus we do not consider any such argument here.

dangerousness the state trial court found most potent—his unprovoked murder of an elderly woman.

V.

For the foregoing reasons, we AFFIRM the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-70007

JEDIDIAH ISAAC MURPHY,

Petitioner-Appellant

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:10-CV-163

(Filed Apr. 20, 2018)

Before KING, DENNIS, and COSTA, Circuit Judges.

PER CURIAM:*

Jedidiah Isaac Murphy, a Texas death row inmate, seeks a certificate of appealability (COA) under 28 U.S.C. § 2253(c)(2) to appeal the denial of his petition

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

for writ of habeas corpus. We GRANT a COA on two of Murphy's claims—that the State suppressed evidence by failing to disclose the existence of a pretrial conversation between a witness and the lead prosecutor and that trial counsel was constitutionally ineffective during the penalty phase of trial by failing to correct a potentially misleading impression created by one of his experts. We DENY Murphy's request on all his other claims.

I.

Jedidiah Isaac Murphy forced 80-year-old Bertie Cunningham into the trunk of her own car, shot her in the head, drove her body to a creek, and dumped her there. Murphy was arrested two days later. He admitted to the shooting and led police to the location of Cunningham's body. Later at the police station, he wrote and signed a statement claiming that he accidentally shot Cunningham while forcing her into her own trunk.

The State of Texas tried Murphy for capital murder. During the guilt phase of Murphy's trial, Murphy's counsel objected to the introduction of Murphy's signed statement. Counsel argued it was given both involuntarily and in violation of *Miranda*. She also requested an instruction directing the jury to consider the voluntariness of the statement. Her request was granted.

To show Murphy's signed statement was lawfully obtained, the State called the detective who acquired it. According to the detective, when Murphy was

arrested he was given the *Miranda* warning and brought to a magistrate for arraignment. After the arraignment, the detective drove Murphy to the creek where Cunningham's body was located. The detective asked Murphy to get out of the car and show him where Murphy threw his gun, but Murphy refused. Murphy was taken back to the police station. There, he wrote and signed a statement admitting to the shooting but claiming it was an accident. For the first seven days after his arrest, Murphy voluntarily spoke to the police when interrogated. But on the eighth day, after being given the *Miranda* warning, Murphy told the detective he no longer wished to speak to the police. His request was honored. Based on this testimony, the trial court admitted Murphy's signed statement.

The detective also testified that he drove Murphy around, looking for the spot where Murphy abducted and killed Cunningham. Murphy was not able to identify the spot. During cross-examination, defense counsel elicited that Murphy was both cooperative and truthful when he tried but failed to identify where the abduction occurred. On redirect, the State elicited that the detective's opinion of Murphy's truthfulness eroded over time. According to the detective, Murphy did not answer "quite a few" questions and parts of his statement turned out to be false.

The jury was instructed on capital murder, murder, and manslaughter. During summation, Murphy's counsel argued that if Murphy's gun went off accidentally, he did not intend to kill Cunningham, and thus he could not be convicted of capital murder. The

prosecution told the jury that capital murder "is the first offense you are to consider. Only if you do not believe the State has proven it beyond a reasonable doubt do you go to one of the lesser included offenses." This drew no objection from Murphy's counsel. The jury convicted Murphy of capital murder.

The State sought the death penalty. During this phase of the trial, the sides clashed over the future threat to society Murphy would pose if allowed to live. In particular, the severity of Murphy's history of violence was a point of contention.

To demonstrate such a history, the State introduced evidence implicating Murphy in a three-year-old kidnapping. Sheryl Wilhelm testified that Murphy had kidnapped her three years before the Cunningham killing. After seeing a TV news report on Cunningham's murder which featured Murphy's photo, Wilhelm called the police to report Murphy as her potential kidnapper. She identified Murphy as her kidnapper in a photo lineup and then again at trial. The detective who conducted the photo lineup, John Stanton, testified that Wilhelm's "was one of the better photo I.D.'s" he ever had and that she said "she was virtually sure that that was the guy who abducted her."

Murphy called a psychologist to attack Wilhelm's identification. The psychologist testified that Wilhelm's memory was potentially influenced by the photo of Murphy she saw on the news. He also pointed out prominent differences between a composite sketch, made just a week after the kidnapping, and the press

photo releases of Murphy. Finally, the psychologist testified that the photo lineup was unfairly constructed—obvious differences between the mugshots reduced the odds of selection from one-in-six to one-in-three.

Defense counsel also raised an alibi defense to Wilhelm's kidnapping. Wilhelm said she had been kidnapped, escaped, and had her car stolen at 11:30 a.m. in Arlington, Texas. The day after her kidnapping, Wilhelm's car was found in Wichita Falls, Texas. In the car, the police found documents belonging to another woman. That woman had been assaulted and had her purse stolen at 8:24 p.m. on the day of Wilhelm's kidnapping outside a Braum's restaurant in Wichita Falls. Also on the same day, Murphy clocked in for his night shift at 11:54 p.m. in Terrell, Texas. Murphy's counsel argued to the jury that Murphy did not have time to kidnap Wilhelm in Arlington, rob the other woman in Wichita Falls, and make it to work in Terrell.

The trial did not just focus on whether Murphy was a future threat to society. Murphy argued that mitigating circumstances reduced his moral blameworthiness. To buttress this case, Murphy called two psychologists: Dr. Mary Connell and Dr. Jaye Crowder.

Dr. Connell testified that she administered two tests on Murphy: the MMPI-II and the MCMI-III. The MMPI-II develops a mental and emotional profile of the test taker by comparing his or her answers to 567 true-false questions with other people in clinical settings. Murphy's MMPI-II results showed, per Dr. Connell, that Murphy exhibited depression, anxiety,

physical ailments, and paranoid thoughts. The MCMI-III consists of 175 questions related to the test taker's character. Murphy's MCMI-III results suggested, again per Dr. Connell, that Murphy suffered from extreme emotional distress and very disturbed function. Murphy's results on both tests would normally prompt referral for psychiatric consultation and probably indicate a need for medication. Importantly, no psychologist besides Dr. Connell was directly involved in administering or interpreting Murphy's MMPI-II and MCMI-III. The tests only draw on algorithms constructed by other psychologists to render hypotheses about the subject's mental state and character. Further, neither test returns a final interpretation. Rather, as both reports—which were introduced into evidence—and Dr. Connell explained, the MMPI-II and MCMI-III offer only hypotheses.

When cross-examined, Dr. Connell agreed that Dr. James Butcher, "probably the leading expert in the country on the interpretation of the MMPI," had interpreted Murphy's MMPI-II. In reality, Dr. Butcher had developed the test, but a computer algorithm was tasked with interpreting Murphy's answers. This did not stop Dr. Connell from appearing to agree that Dr. Butcher himself concluded that Murphy "has serious problems controlling his impulses and temper," is "assaultive," "loses control easily," is manipulative, matches the profile of a Megargee Type H offender, and is a poor candidate for psychotherapy. The prosecution also referred to the MCMI-III as a "report produced by Dr. [Theodore] Millon in this case," without correction.

Dr. Millon developed the MCMI-III, and Dr. Connell affirmed the prosecution's characterization of him as authoritative. The prosecution elicited from Dr. Connell that through the MCMI-III, Dr. Millon himself had concluded that Murphy "may have reported more psychological symptoms than objectively exist," and Murphy has "a moderate tendency toward self-deprecation and a consequent exaggeration of current emotional problems." On redirect, Dr. Connell did not clarify that neither Dr. Butcher nor Dr. Millon personally administered or evaluated Murphy's tests.

Murphy's trial counsel also called another psychologist to provide mitigation testimony. Dr. Crowder, a psychologist and university faculty member, diagnosed Murphy with major depression and dysthymic disorder. He testified that Murphy was alcohol dependent, a narcissist, and had a borderline personality disorder. He explained what these disorders are and what effects they had on Murphy's behavior. Dr. Crowder further explained the effects of Murphy's childhood abandonment on his neurological development and ability to make decisions. He said there was hope for Murphy through treatment in a controlled environment.

During cross-examination, Dr. Crowder acknowledged that were Murphy outside prison, he would be "concerned." The prosecution also recited the gruesome facts of four death penalty cases where Dr. Crowder had testified that the defendant would not be a future threat to society. And Dr. Crowder admitted that he would not have predicted that any member of a group

called the "Texas Seven," who broke out of prison and murdered a police officer, would have presented a danger in prison. But, Dr. Crowder stated that "the odds are against [Murphy's] future dangerousness in prison." Moreover, Dr. Crowder commented on the statistically low odds of escape for all prisoners and that Murphy presented a low escape risk. On redirect, Dr. Crowder noted that Murphy would not be parole eligible for a minimum of 40 years.

During summation, the prosecution emphasized the "chilling" results of Murphy's MMPI-II and MCMI-III. Specifically, the prosecution argued that Murphy's profile matched that of a Megargee Type H offender—"one of the most seriously disturbed inmate types," and for whom "[a]djustment to prison appears to be difficult." According to the prosecution, Dr. Butcher—the developer of the MMPI-II—had personally interpreted Murphy's results. Per the prosecution, Dr. Butcher thought Murphy was "a poor candidate for psychotherapy" and that "[i]ndividuals with his profile are not very amenable to changing their behavior." The prosecution further noted that Dr. Butcher was "hired by the defense to look at the tests administered," and was "not some expert that we hired." Murphy's counsel did not object to this line of argument or counter it during her concluding remarks.

The jury found that Murphy was a continuing threat to society and there were insufficient mitigating circumstances to warrant life in prison. *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2. Based on these findings, Murphy was sentenced to death.

Murphy's conviction and sentence were affirmed on direct appeal. *Murphy v. State*, 112 S.W.3d 592, 595 (Tex. Crim. App. 2003). Likewise, his first state habeas application was denied. *Ex parte Murphy*, No. WR–70,832–01, 2009 WL 766213, at *1 (Tex. Crim. App. Mar. 25, 2009) (per curiam) (not designated for publication).

In 2009, Murphy's new lawyer cold called Wilhelm and Stanton and asked them what happened during the photo lineup. Wilhelm said that when she identified Murphy, she stated to Stanton: "This is him. This looks a lot like him, and I'm pretty sure it's him." She also stated that: "You know, nobody's ever 100 percent sure. . . . I'm talking about anything in this life but, I mean, to me, it was him. I mean, 95 to 100 percent it was him." Wilhelm said that the lead prosecutor in Murphy's case came to her house before trial and, in Murphy's lawyer's words, "told [her] that [she] got the right guy."

During the call with Stanton, Stanton agreed that Wilhelm's statement—that she was "pretty sure"—comported with his recollection of what she said during the photo lineup. Murphy's new lawyer also asked Stanton twice whether Wilhelm's identification was tentative. The first time, Stanton responded that Wilhelm "was pretty strong to the photo of [Murphy]." The second time, Stanton agreed that it was "a strong tentative ID complicated by the fact that she could have been identifying the guy she saw on TV as opposed to the guy who robbed her." Stanton then discussed why he did not pursue charges against Murphy for the

kidnapping. Stanton said he did not think it would "fly through a DA's office." Stanton thought "hell, I could defend the guy off of that one. . . . And I'm not even a lawyer."

Murphy filed a federal habeas petition. The district court stayed the proceedings to give Murphy time to exhaust three sets of claims in the state system: (1) suppression of evidence and use of false testimony by the prosecution, (2) ineffective assistance of trial counsel at the guilt phase, and (3) ineffective assistance of trial counsel at the penalty phase.

Following the stay, Murphy filed a second state habeas application. The Texas Court of Criminal Appeals (TCCA) dismissed as abuses of the writ Murphy's two sets of ineffective assistance claims. *Ex parte Murphy*, No. WR–70,832–02, 2010 WL 3905152, at *1 (Tex. Crim. App. Oct. 6, 2010) (per curiam) (not designated for publication). With respect to Murphy's suppression and false testimony claims, the TCCA remanded with instructions to determine whether the claim was procedurally barred and, if not, whether it had merit. *Id.*

The state trial court held an evidentiary hearing where it heard testimony from Wilhelm, Stanton, the lead prosecutor, and Murphy's lead trial counsel. The court found that Murphy's suppression and false testimony claims should be dismissed as procedurally barred and alternatively denied as meritless. Based on the trial court's findings, the TCCA concluded that Murphy's application was an abuse of the writ and dismissed his application. *Ex parte Murphy*, No.

WR-70,832-02, 2012 WL 982945, at *1 (Tex. Crim. App. Mar. 21, 2012) (per curiam) (not designated for publication).

Murphy returned to federal court and raised the three sets of now exhausted claims, among others. The district court denied Murphy relief on all of his claims. It also denied his request for an evidentiary hearing.

As the district court denied Murphy's request for a COA, he now seeks one from this court.

II.

We may issue a COA only when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further' "—i.e., whether the applicant's claim is "debatable." *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327, 348 (2003)).

Here, Murphy seeks a COA on three sets of claims:

(1) Suppression of evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and introduction of false testimony in violation of

Napue v. Illinois, 360 U.S. 264 (1959),[1] based on:

a. Wilhelm's statement that she was only "pretty sure" Murphy was her kidnapper;

b. Wilhelm's opinion that she was only 95 percent sure;

c. Stanton's opinion that the identification was a strong tentative;

d. Stanton's opinion that he did not pursue kidnapping charges against Murphy because Wilhelm's identification could have been tainted by seeing Murphy on TV;

e. The pretrial conversation where the lead prosecutor confirmed to Wilhelm that she got the right guy;

(2) Ineffective assistance of trial counsel at the guilt phase (IATC-guilt), arising from his counsel's:

a. Failure to object to the introduction of his post-arrest silence;

b. Opening of the door to police opinion testimony;

c. Failure to object to a prosecutor's statement during summation;

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[1] Murphy labels his claims as violations of *Giglio v. United States*, 405 U.S. 150 (1972), rather than *Napue*. But *Napue* is a better fit for Murphy's claims, as here he is alleging the use of false testimony, not merely the failure to disclose contradictory evidence.

(3) Ineffective assistance of trial counsel at the penalty phase (IATC-penalty), arising from his counsel's:

a. Failure to submit evidence showing the timeline of the Wilhelm kidnapping was logistically impossible;

b. Failure to correct a false impression created by Dr. Connell; and

c. Decision to call Dr. Crowder.

We grant a COA on claims (1)(e) and (3)(b). We deny COAs on all others.

III.

As just stated, Murphy presented the district court with five *Brady* or *Napue* claims. The district court denied these claims, finding them procedurally barred and alternatively meritless. For the first four claims, this denial is not debatable by reasonable jurists, and therefore we deny Murphy's request for a COA on those claims. *See Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000) (holding that when the district court dismisses on procedural grounds, a COA should issue only if the merits of the claim and the procedural ruling are debatable by reasonable jurists). For the last one, the denial was debatable and thus a COA should issue.

Murphy's first state habeas application did not raise his present claims. When they were raised in his second application, the TCCA dismissed them based on

abuse of the writ. *Murphy*, 2012 WL 982945, at *1. Texas's abuse of the writ doctrine is an independent state ground that ordinarily will foreclose federal review. *Moore v. Quarterman*, 534 F.3d 454, 463 (5th Cir. 2008). Murphy attempts to overcome this procedural bar by relying on *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). Under *Martinez* and *Trevino*, the ineffectiveness of state habeas counsel may excuse a petitioner's procedural default "of a single claim"—ineffective assistance of trial counsel. *Davila v. Davis*, 137 S. Ct. 2058, 2062 (2017). No court appears to have extended *Martinez* and *Trevino* to excuse procedural default of a *Brady* or *Napue* claim. We are also bound by our past pronouncements that *Martinez* and *Trevino* apply "only" to ineffective assistance of trial counsel claims. *See*, *e.g.*, *Speer v. Stephens*, 781 F.3d 784, 785 (5th Cir. 2015). And the Supreme Court in *Davila* was unwilling to extend *Martinez* and *Trevino* beyond ineffective assistance of trial counsel claims, calling the exception "narrow," "highly circumscribed," and available only in "limited circumstances." 137 S. Ct. at 2065-66. We therefore do not find it debatable whether Murphy can excuse default of his *Brady* and *Napue* claims through *Martinez* and *Trevino*.

Murphy also tries to excuse his procedural default using *Banks v. Dretke*, 540 U.S. 668 (2004). "A federal court may consider the merits of a procedurally defaulted claim if the petitioner shows 'cause for the default and prejudice from a violation of federal law.'" *Canales v. Stephens*, 765 F.3d 551, 562 (5th Cir. 2014)

(quoting *Martinez*, 566 U.S. at 10). Under *Banks*, a petitioner shows "cause" if "the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence"—that is, the evidence was suppressed within the meaning of *Brady*. 540 U.S. at 691.[2] To establish this, Murphy has to show that he could not discover the favorable evidence through the exercise of "reasonable diligence." *See Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002); *Rector v. Johnson*, 120 F.3d 551, 558 (5th Cir. 1997). To show prejudice, Murphy must demonstrate that "the suppressed evidence is 'material' for *Brady* purposes." *See Rocha v. Thaler*, 619 F.3d 387, 394 (5th Cir. 2010). Murphy fails, even debatably, to make either showing for the first four claims.

The state trial court found that by exercising reasonable diligence, Murphy could have ascertained the basis for his claims in time to raise them in his original state habeas application.

The state court found that the facts underlying Murphy's first four claims—Wilhelm's and Stanton's alleged statements and opinions—could be revealed via cross-examination at the pretrial hearing or trial itself. This finding is entitled to deference under 28 U.S.C. § 2254(e)(1). *See Williams v. Quarterman*, 551 F.3d 352, 358 (5th Cir. 2008).[3] Section 2254(e)(1)

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[2] Neither party argues that the analysis is different for Murphy's *Napue* claims. We therefore perform the same analysis to dispatch both types of claims.

[3] Murphy's argument against applying § 2254(e)(1) does not relate to the state trial court's findings on procedural default.

provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and that this "presumption of correctness" may be rebutted only "by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Murphy cannot even debatably overcome this presumption for the first four claims as he presents no evidence rebutting the state court's finding. He does have some evidence indicating Stanton and Wilhelm would not speak to the defense team after, not during, trial. But none of this evidence indicates that Stanton would have lied under oath about his opinion of Wilhelm's identification and his reason for not pursuing kidnapping charges against Murphy. And the evidence Murphy cites to show that Wilhelm would have lied only indicates that Wilhelm would have testified that she was 100 percent certain Murphy kidnapped

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Rather, he argues only that § 2254(e)(1)'s presumption of correctness does not attach to the trial court's findings on the merits because the TCCA dismissed Murphy's second application as an abuse of the writ without considering the merits. But even this argument is off the mark. "A trial court's factual findings are entitled to a presumption of correctness even if the state appellate court reached a different legal conclusion when applying the law to those facts." *Williams*, 551 F.3d at 358. Only when the trial court's factual findings "were directly inconsistent with the appellate court's decision" will they be denied a presumption of correctness. *Id.* (citing *Micheaux v. Collins*, 944 F.2d 231, 232 (5th Cir. 1991) (en banc)). Here, the state trial court's findings on the merits were not directly inconsistent with the TCCA's dismissal based on abuse of the writ. Thus, all of the state trial court's findings are entitled to a presumption of correctness under § 2254(e)(1). Because we conclude that it is debatable by reasonable jurists whether Murphy's *Brady* and *Napue* claims were "adjudicated on the merits" by the state courts, we do not apply 28 U.S.C. § 2254(d)'s deferential standard of review at this stage.

her. This does not show that Wilhelm would not disclose what she said during the photo lineup.

Nor can Murphy debatably show prejudice for any of these four claims. The state court found that every piece of allegedly suppressed evidence either did not exist, was not possessed by the State, or was immaterial. On Murphy's first claim, the court found that Wilhelm's "pretty sure" comment both did not accurately reflect what she said at the photo lineup and, either way, was substantially similar to what she said at trial. *See Westley v. Johnson*, 83 F.3d 714, 725 (5th Cir. 1996) (holding that evidence is immaterial if it duplicates evidence at trial). On the second claim, the court found that Wilhelm's opinion that she was 95 percent sure was both substantially similar to her statements at trial and was not possessed by the State. *Cf. Avila v. Quarterman*, 560 F.3d 299, 309 (5th Cir. 2009) (holding that the undisclosed opinion of an expert witness is not imputed to the state unless the witness is part of the prosecution team); *United States v. Pelullo*, 399 F.3d 197, 211–12 (3d Cir. 2005) (holding that no "cause" exists under *Banks* if the prosecution is unaware of the evidence). Turning to the third claim, the court found that Stanton's opinion that Wilhelm's identification was a strong tentative was similar to what Stanton said at trial and therefore was immaterial. *See Westley*, 83 F.3d at 725. On the fourth claim, the court found, based on Stanton's testimony at the evidentiary hearing, that the real reason Stanton did not pursue the kidnapping charges against Murphy was because Murphy was already facing capital murder charges, not

because he thought Wilhelm's identification was weak. *See United States v. Nixon*, 881 F.2d 1305, 1308 (5th Cir. 1989) (holding that *Brady* does not apply to neutral evidence). All these findings are presumed correct unless rebutted by clear and convincing evidence. Murphy cannot even debatably overcome this hurdle.

Murphy's fifth claim based on Wilhelm's pretrial conversation with the prosecutor presents a different situation. It is debatable whether Murphy had a reasonable opportunity to discover the conversation pretrial or at trial. And it is debatable whether Murphy had an obligation after trial to discover the conversation given the State's possible suppression of it. *See Johnson v. Dretke*, 394 F.3d 332, 337 (5th Cir. 2004) ("In finding procedural default, the district court relied upon the fact that [the relevant *Brady* material] was available in the public record. However, if the State failed under a duty to disclose the evidence, then its location in the public record, in another defendant's file, is immaterial." (citing *Banks*, 540 U.S. at 690–93)). Finally, it is debatable whether the conversation was impeachment evidence sufficient to establish materiality under *Brady*. As we are granting a COA on this claim, we will not linger on it. To be brief, we are not convinced that the district court's merits and procedural grounds for denying this claim are beyond debate. *See Slack*, 529 U.S. at 484–85.

In sum, reasonable jurists could not debate that the district court properly dismissed Murphy's first four *Brady* and *Napue* claims on the basis that they were procedurally barred and meritless. The same

cannot be said for Murphy's last claim, and accordingly we grant a COA on it. We next turn to Murphy's two sets of ineffective assistance of trial counsel claims.

IV.

Murphy argues that his trial counsel was constitutionally ineffective at both the guilt and penalty phases. His claims are governed by the well-known *Strickland* standard. Murphy must show: (1) that his trial counsel rendered deficient performance, and (2) that the deficient performance resulted in actual prejudice. *See*, *e.g.*, *Rhoades v. Davis*, 852 F.3d 422, 431 (5th Cir. 2017) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

The first prong of *Strickland* "sets a high bar." *Buck*, 137 S. Ct. at 775. "To demonstrate deficient performance, the defendant must show that, in light of the circumstances as they appeared at the time of the conduct, 'counsel's representation fell below an objective standard of reasonableness' as measured by 'prevailing professional norms.'" *Rhoades*, 852 F.3d at 431–32 (quoting *Strickland*, 466 U.S. at 687–88).

To satisfy *Strickland*'s second prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Mildly complicating things, Murphy's IATC claims were procedurally defaulted. Thus, to acquire a COA, he must show not only that his underlying IATC claims are debatable, but also that he debatably has excuse for default under *Martinez* and *Trevino*. *See Slack*, 529 U.S. at 484–85.

Ordinarily, a state prisoner bringing a federal habeas petition is foreclosed from presenting a claim dismissed as an abuse of the writ by the TCCA. *See Moore*, 534 F.3d at 463. Nevertheless, this procedural bar may be overcome by "showing cause for the default and prejudice." *Martinez*, 566 U.S. at 10. Under *Martinez* and *Trevino*, Murphy may show cause and prejudice by showing: "(1) that his claim of ineffective assistance of counsel at trial is substantial—i.e., has some merit—and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013).

The parties' dispute here centers on *Martinez*'s first requirement: whether Murphy's underlying IATC claims are substantial.[4] Conveniently, the test for

[4] The district court held, and the State urges us to hold, that Murphy cannot establish *Martinez*'s second requirement—that his original state habeas counsel was ineffective. For the district court, the lack of merit to Murphy's underlying IATC claims meant that his habeas counsel could not have been ineffective in failing to raise them.

We do not need to decide this issue for the five IATC claims that do not satisfy *Martinez*'s first requirement. But, for the IATC claim we find debatable by reasonable jurists, we conclude that state habeas counsel was at least debatably ineffective in failing

whether the underlying claim is substantial is the same as the one for granting a COA—i.e., the claim is debatable by reasonable jurists. *See Trevino v. Davis*, 861 F.3d 545, 548–49 (5th Cir. 2017). All this is to say that Murphy may acquire a COA on his claims if he shows that his underlying IATC claims are debatable.

No state court has adjudicated Murphy's IATC claims on the merits. Nor has a state court make [sic] relevant factual findings on them. Thus, the strictures of 28 U.S.C. § 2254(d) and (e)(1) do not apply, and we review de novo. With this in mind, we turn first to Murphy's IATC-guilt claims.

A.

Murphy isolates three acts or omissions that he contends establish independent IATC-guilt claims: (1) his counsel did not object to the introduction of his post-arrest silence; (2) his counsel opened the door to police opinion testimony on Murphy's lack of truthfulness and cooperation; and (3) his counsel did not object to the prosecutor's comment on the sequencing of jury deliberations. None of these gives rise to an IATC claim reasonable jurists could debate.

1.

Murphy contends that his counsel twice failed to object when the prosecution's questioning turned to

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to raise it. *See King v. Davis*, 703 F. App'x 320, 328 n.9 (5th Cir. 2017) (per curiam).

Murphy's post-arrest silence. First, the prosecution elicited testimony from the detective who interrogated Murphy that Murphy refused to show upon request the police where he threw his gun. Second, the prosecution elicited testimony that Murphy eventually invoked his right to silence after receiving the *Miranda* warning. According to Murphy, these questions about his post-arrest silence should have drawn meritorious objections.[5] Counsel's failure to object prejudiced Murphy, as his post-arrest silence made it seem like he was not cooperating or being wholly truthful with the police. This threw shade on his theory that his gun fired accidentally because this theory depended heavily on his credibility. According to Murphy, this was the difference between life and death. If Murphy could show the shooting was an accident, he could only be convicted of murder or manslaughter, not capital murder.

Murphy's argument does not debatably satisfy either of *Strickland*'s prongs for a simple reason—an objection would have been frivolous. *See Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994) ("Failure to raise meritless objections is not ineffective lawyering; it is the very opposite."). The Due Process Clause of the Fourteenth Amendment protects a defendant's silence after receiving the *Miranda* warning. *Doyle v. Ohio*, 426 U.S.

[5] Murphy argues that this line of questioning is prohibited under both the federal Constitution and Texas evidentiary law. However, he does not argue that there are any material differences between federal and Texas law. Accordingly, given the absence of argument, we will not search for any differences, if any exist, and our disposition of his federal-law argument dispenses with his state-law argument.

610, 619 (1976). While the *Miranda* warning "contain[s] no express assurance that silence will carry no penalty, such assurance is implicit." *Id.* at 618. It would therefore be "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* But a "prosecutor's reference to a defendant's post-*Miranda* silence may properly be made where it is not 'used to impeach' the defendant's 'exculpatory story', or as substantive evidence of guilt, but rather to respond to some contention of the defendant concerning his post-arrest behavior." *United States v. Martinez-Larraga*, 517 F.3d 258, 268 (5th Cir. 2008) (emphasis removed) (citing *Doyle*, 426 U.S. at 632 n.11).

In this case, no meritorious objection existed because the State did not elicit the detective's testimony to impeach Murphy or show his guilt. Instead, it elicited and used the testimony to show that Murphy's signed statement was voluntary—a contested issue throughout trial that was eventually submitted to the jury. Both of the detective's answers demonstrated the voluntariness of Murphy's statement—they showed that Murphy knew he could stop the questioning and that the police would honor his request. *See Michigan v. Mosley*, 423 U.S. 96, 101–04 (1975) (citing the "right to cut off questioning" as a "critical safeguard" against coercion). Murphy's counsel had "opened the door" to these questions by putting his voluntariness at issue, and absent some evidence that the prosecution used Murphy's silence for a prohibited purpose, Murphy's

counsel lacked a valid objection. *See Martinez-Larraga*, 517 F.3d at 268 (quoting *United States v. Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975)).[6]

2.

Next, Murphy contends that his trial counsel blundered when she opened the door to the detective's opinion on Murphy's truthfulness and cooperation. Ordinarily, under Texas law, a police witness may not directly testify as to his opinion on the defendant's truthfulness. *See Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997). Here though, Murphy's counsel asked the detective whether he thought Murphy was truthful and cooperative when helping the police find where he abducted and killed Cunningham. This opened the door for the prosecution. *See id.* at 71 ("[I]nadmissible evidence may be admitted if the party against whom the evidence is offered 'opens the door.' "). The prosecution stepped through it, eliciting that the detective thought Murphy was not being truthful because Murphy did not answer "quite a few"

[6] Murphy's argument that an evidentiary hearing might allow him to show his counsel performed deficiently has no merit. Whether counsel's failure to object was a result of carelessness or careful consideration, the fact remains that there was no objection to be had. This is a clear circumstance where we can assume "the truth of all the facts" the petitioner seeks "to prove at the evidentiary hearing" and remain confident that "he still could not be granted federal habeas relief." *See Schriro v. Landrigan*, 550 U.S. 465, 481 (2007). In such circumstances, reasonable jurists could not debate whether the district court abused its discretion by denying an evidentiary hearing. *See id.*

questions and parts of his statement were false. Per Murphy, this attack on his truthfulness and cooperation decimated his best defense. He needed to be credible in the jury's eyes for it to accept his story that his gun fired accidentally.

Murphy does not debatably satisfy either prong of *Strickland*. Judged on the record before us, counsel's decision to ask the detective whether Murphy was being truthful and cooperative was objectively reasonable. A little context makes this clear. A point of contention between the parties at trial was whether venue was proper. This turned on the location of Cunningham's abduction and murder. On direct, the detective said that Murphy said he wished to cooperate with the police efforts to ascertain this location—"he didn't want to hide anything." The detective drove Murphy around, trying to locate the spot, but Murphy never identified it. The detective and Murphy returned to the police station, where Murphy then wrote the statement that he shot Cunningham accidentally. The prosecution elicited from the detective that there were several inaccuracies in the signed statement. On cross-examination, the detective admitted that Murphy was trying to be helpful and cooperate with the detective's attempt to find the location of abduction. Despite his cooperation, the spot was never pinpointed. On redirect, the prosecution countered by eliciting testimony that the detective's opinion of Murphy's truthfulness eroded over time. According to the detective, Murphy did not answer "quite a few" questions and parts of his statement were false.

From the record, it is clear that defense counsel elicited that Murphy was being cooperative to support her venue argument. It was her follow-up question to the detective's admission that they could not pinpoint the abduction site. The detective's testimony—that Murphy and he drove all around the relevant county and Murphy earnestly tried and failed to identify the spot—supports the theory that the abduction occurred outside the relevant venue. Moreover, given that Murphy's credibility was already under attack, eliciting testimony that he was cooperative was reasonable. This is especially the case because there was not much else for counsel to go on. Granting that Murphy needed to be credible for his accidental shooting theory to fly, there does not appear to be any other evidence to bolster Murphy. Thus, counsel made an objectively reasonable decision given the poor options before her.

Murphy's counter is straightforward—he wants a chance to show that his counsel's question was not an informed tactical decision. To do so, he seeks an evidentiary hearing. That would allow him to ask his trial counsel—who his present lawyer submits will not cooperate willingly—whether she pondered the fact that her question would open the door to unfavorable opinion testimony. He never got a chance to develop such testimony before the state courts because original state habeas counsel never brought an IATC claim. And the federal district court deprived him of a chance by denying his request for an evidentiary hearing. He submits that this denial was debatably an abuse of discretion. *See Schriro v. Landrigan*, 550 U.S. 465, 468

(2007) (holding that denials of evidentiary hearings are reviewed for abuse of discretion).

Contra Murphy, we conclude that reasonable jurists could not debate whether the district court abused its discretion by denying an evidentiary hearing on this claim.[7] No abuse of discretion occurs if "there is not 'a factual dispute which, if resolved in [the prisoner's] favor, would entitle him to relief.'" *Norman v. Stephens*, 817 F.3d 226, 235 (5th Cir. 2016) (alteration in original) (quoting *Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir. 2000)). An evidentiary hearing is not required "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief." *See Schriro*, 550 U.S. at 474.

Murphy is correct to note that the strong presumption of competence attaches only after "thorough investigation of law and facts relevant to plausible options." *Strickland*, 466 U.S. at 690. But in this case, even if we presume counsel's decision was unconsidered and thus dispense with the presumption of competence, Murphy would lack even a debatable *Strickland* claim. The relevant inquiry is whether "counsel's representation fell below an *objective* standard of reasonableness." *Strickland*, 466 U.S. at 688 (emphasis added). *Strickland* "calls for an inquiry into the objective reasonableness of counsel's *performance*, not counsel's subjective state of mind." *Harrington v. Richter*, 562 U.S. 86, 110 (2011)

[7] The State also argues that such record development is barred by 28 U.S.C. § 2254(e)(2). We conclude that reasonable jurists could debate this point. Therefore, at this stage we do not consider (e)(2)'s bar on record development.

(emphasis added). Accordingly, we need not "insist counsel confirm every aspect of the strategic basis for his or her actions." *Id.* at 109. Thus, our determination that counsel's performance was objectively reasonable means there is no need to inquire into counsel's state of mind.

And even if trial counsel admitted that she did not contemplate the full import of her decision, "there is no expectation that competent counsel will be a flawless strategist or tactician." *Id.* at 110. "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). While isolated errors "can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Richter*, 562 U.S. at 111 (citation omitted) (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)). Here, counsel attempted to get Murphy's case dismissed for lack of venue. She strenuously tried to keep out Murphy's signed statement. When it came in, she argued to the jury that it was involuntarily given. And she supported Murphy's accidental shooting theory by cross-examining State witnesses about unintended discharge and calling expert witnesses to support the theory. In light of what counsel was given to work with and the record evidence indicating overall competent performance at the guilt phase, the district court did not debatably abuse its discretion in finding the record "precludes habeas relief." *See Schriro*, 550 U.S. at 474.

More importantly, Murphy's hypothetical evidence of his counsel's incompetence would have no bearing on whether he was prejudiced. Under *Strickland*'s prejudice prong, "[i]t is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 693). Rather, the alleged errors "must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* (quoting *Strickland*, 466 U.S. at 687). Here, the evidence supporting Murphy's accidental shooting theory was weak and the State's evidence refuting it was strong. Soon after the shooting, Murphy attempted to withdraw money from Cunningham's bank account with her ATM card. When that failed, he spent the next two days using Cunningham's credit cards to buy food, beer, and other frivolities for himself and others. He drove his niece and her two teenage friends around in Cunningham's car with Cunningham's body still in the trunk. Murphy shot Cunningham in the head, and some forensic evidence indicated that the gun was fired right next to her. And more than the detective's opinion impeached Murphy's truthfulness. Factual inaccuracies in the signed statement were introduced before Murphy's counsel asked the allegedly incompetent question. As Murphy now admits, the only real evidence to support his theory was his self-serving statement, which was revealed only after his arrest. Given all this, it is undebatable that removing both the beneficial and detrimental opinion testimony on Murphy's cooperation and truthfulness would not create a

"reasonable probability" of acquittal on capital murder. *See Strickland*, 466 U.S. at 694.

3.

Murphy's final IATC-guilt claim concerns unobjected-to comments by the prosecution about the jury's deliberative process. As background, under Texas law, juries are left to their own devices when deciding the order in which they will consider the charges against the defendant. *See Barrios v. State*, 283 S.W.3d 348, 352 (Tex. Crim. App. 2009). This means that a jury need not acquit a defendant—i.e., unanimously agree that reasonable doubt exists—on a greater offense before considering a lesser one. *See id.* at 352–53. That said, jury instructions which imply that acquittal on a greater offense must precede consideration of lesser included offenses are considered "inartful" and not best practice, but have not been held to be erroneous. *See id.* at 353. In *Barrios*, the charge at issue was upheld. *Id.* There, the jury was instructed on capital murder, and then instructed that "[u]nless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and next consider whether the defendant is guilty of robbery." *Id.* at 349.

In this case, the jury was instructed on capital murder, murder, and manslaughter. Similarly to the instructions in *Barrios*, the instructions here provided the jury with the elements of capital murder and then instructed that "[i]f you do not so believe, or if you have

a reasonable doubt thereof, you will next consider whether the defendant is guilty of" the two lesser offenses. In accord with these instructions, the prosecution told the jury during summation that capital murder "is the first offense you are to consider. Only if you do not believe the State has proven it beyond a reasonable doubt do you go to one of the lesser included offenses."

Murphy argues that the prosecutor's comment was an erroneous description of Texas law. It misled the jury, implying that they had to acquit on capital murder before considering the lesser offenses. According to Murphy, counsel's failure to object was debatably unreasonable and prejudicial as it is possible the jury never considered the lesser offenses.

We cannot agree. Murphy has not argued that the jury instruction itself was erroneous, and we can discern no viable objection to the prosecution's near repetition of a rightly given instruction. The cases Murphy cites are distinguishable on this basis. Two of them involve a prosecutor who made comments which were contrary to the charge. *See Ex parte Drinkert*, 821 S.W.2d 953, 955 (Tex. Crim. App. 1991) (finding counsel's performance deficient based on failure to object to a prosecutor's statement that "was not only contrary to the court's charge," but also "a misstatement of the applicable law"); *Davis v. State*, 506 S.W.2d 909, 911 (Tex. Crim. App. 1974) (reversing a conviction based on prosecutorial statements which were "contrary to the court's charge"). The third involves an incorrect statement on a point of law left completely unaddressed by

the instructions. *See Andrews v. State*, 159 S.W.3d 98, 100 (Tex. Crim. App. 2005).

Further, reasonable jurists could not debate whether prejudice exists. Put simply, while it is "conceivable" that the prosecutor's functional restatement of the instructions influenced the jury deliberations in a manner the instructions taken alone would not, such a sequence of events lacks any "reasonable probability." *See Strickland*, 466 U.S. at 693–94.

We next consider Murphy's IATC-penalty claims.

B.

Murphy isolates three errors by his counsel during his trial's penalty phase: (1) she failed to introduce evidence showing the Wilhelm kidnapping timeline was logistically impossible; (2) she failed to correct a false impression created by Dr. Connell; and (3) she unwisely called Dr. Crowder. The second claim is debatable by reasonable jurists, and we therefore grant a COA on it. The other two are not.

1.

Murphy argues that his counsel should have introduced more evidence to support his alibi for the Wilhelm kidnapping. Specifically, more should have been offered to show that the kidnapping timeline did not add up. Recall that the day Wilhelm was kidnapped and escaped, another woman was robbed in Wichita Falls at 8:24 p.m. A few miles away, Wilhelm's car was

discovered with that woman's possessions in it. Murphy clocked in for work in Terrell at 11:54 p.m. that same day. Murphy argues his counsel should have submitted evidence that it takes 3 hours and 15 minutes to drive from Wichita Falls to Murphy's job in Terrell (accounting for a detour to accommodate where Wilhelm's car was found). Murphy contends that such evidence would show it was logistically impossible for him to pull off the back-to-back crimes and make it to work on time.

Not so. If Murphy robbed the other woman at 8:24 p.m., he would have had 3 hours and 30 minutes to get to work—15 minutes more than the driving time Murphy now proffers. Thus, the evidence would show the feat would be difficult, but not impossible—especially if Murphy was speeding.

This undercuts Murphy's case on both of *Strickland*'s prongs. His counsel did not perform unreasonably or prejudice Murphy by failing to put on evidence showing that the timeline was technically achievable. She had already presented substantial evidence on the alibi defense. She presented evidence of the times and locations of the two crimes and Murphy's clock in, the fact that the other woman's description of her assailant did not match Murphy, and the diary of a woman Murphy lived with, which indicated he stayed home during the day and worked regular night shifts. She also attacked Wilhelm's identification—the main evidence linking Murphy to the kidnapping—through cross-examination and with an expert. Using all this evidence, Murphy's trial counsel argued that Murphy

could not have committed both offenses and clocked in on time. That Murphy's trial counsel did not present evidence showing the drive was cutting it close but ultimately feasible was not debatably unreasonable or prejudicial.[8]

2.

Next, Murphy argues that his trial counsel performed deficiently by failing to correct several impressions left by Dr. Connell's testimony. We address this claim only briefly. *See Busby v. Davis*, 677 F. App'x 884, 893 (5th Cir. 2017) (per curiam) ("At this stage, we simply conclude that reasonable jurists could debate whether [the petitioner] has presented a substantial, or viable, IATC claim sufficient to excuse the procedural default and to merit a COA."). Reasonable jurists could debate whether it was reasonable for counsel not to intervene and whether such intervention had a reasonable probability of causing a different outcome. As this IATC claim is debatable, we also conclude that Murphy's original state habeas counsel was at least debatably ineffective in failing to raise it. Thus, because the district court's merits and procedural grounds for

[8] Once more, we conclude that the district court did not debatably abuse its discretion in refusing Murphy an evidentiary hearing on this claim. Whether counsel's omission of the travel time evidence was considered or not, the omission was objectively reasonable and non-prejudicial.

denying this claim are debatable, we grant Murphy a COA on this claim. *See Slack*, 529 U.S. at 484–85.[9]

3.

Finally, Murphy argues that his trial counsel should not have called Dr. Crowder. He argues that Dr. Crowder's testimony was duplicative with other mitigation witnesses. Rather than helping his case, Dr. Crowder harmed it by admitting that he would be "concerned" if Murphy were outside prison.

Murphy does not debatably satisfy *Strickland*'s performance prong. Viewed without the benefit of hindsight, calling Dr. Crowder to testify was reasonable. Dr. Crowder is a qualified psychologist who has testified during death penalty cases before. He offered useful and unique mitigation testimony. He could deliver an expert opinion on Murphy's mental composition, the effect of Murphy's rough upbringing, and how Murphy's behavior might change in a controlled environment. The mitigation evidence Dr. Crowder offered was non-duplicative—only Dr. Crowder tied Murphy's childhood abandonment to his behavior and depression.

Further, the low level of harm that Dr. Crowder's testimony caused to Murphy's case is strong evidence

[9] We do not reach at this time the question of whether the district court abused its discretion by refusing to grant an evidentiary hearing on this claim. The parties may address this issue in their next round of briefing.

that counsel's decision was prospectively reasonable and non-prejudicial. While Dr. Crowder admitted he would be concerned about Murphy outside prison, he mitigated that admission in several ways. He testified that Murphy would not be parole eligible for 40 years, that the general risk of escape is small, and that Murphy did not present a high risk of escaping. Any issues the prosecution pointed out during cross-examination were problems with Murphy's case and not Dr. Crowder's testimony. To the extent that Dr. Crowder's later explanation could not eliminate the taint of his harmful testimony, that taint was inevitable given the nature of Murphy's case. Thus, reasonable jurists could not debate that Murphy has not satisfied either *Strickland* prong.[10]

V.

For the foregoing reasons, we GRANT a COA on Murphy's *Brady* claim based on Wilhelm's pretrial conversation with the prosecutor and on Murphy's IATC-penalty claim based on failure to correct potentially false impressions created by Dr. Connell. Murphy shall submit a brief on these claims within 60 days. The State shall submit a response within 30 days thereafter. We DENY a COA on the rest of Murphy's claims.

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[10] The district court did not debatably abuse its discretion by refusing Murphy an evidentiary hearing on this claim. Whether counsel anticipated the State's questioning of Dr. Crowder or not, calling Dr. Crowder was objectively reasonable and non-prejudicial.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JEDIDIAH ISAAC MURPHY, Petitioner,	§	Civil Action No. 3:10-CV-163-N (Death Penalty Case)
v.	§	
LORIE DAVIS, Respondent.	§	

MEMORANDUM OPINION AND ORDER DENYING RELIEF

(Filed Jan. 23, 2017)

Jedidiah Isaac Murphy petitions the Court for a writ of habeas corpus, contending that his conviction and death sentence are unconstitutional because the prosecution suppressed exculpatory evidence regarding an extraneous offense, because Murphy received ineffective assistance of trial counsel, because the trial court improperly excused a potential juror for cause and improperly prohibited Murphy from asking potential jurors about victim impact and character evidence. Following an agreed abeyance to exhaust claims in state court, and due to the allegations raising a potential conflict under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the matter was referred to the United States Magistrate Judge and independent counsel was appointed to investigate the issue affecting Murphy's representation before this Court. Having reviewed the record and the report of independent counsel, the

Court adopts the recommendation of the United States Magistrate Judge and denies the requested relief.

I. Procedural Background

Murphy was convicted and sentenced to death for the capital murder of eighty-year-old Bertie Cunningham, who had given him a ride in her car. *State v. Murphy*, Cause No. F-00-02424-NM (194th Jud. Dist. Ct., Dallas Cnty., Tex. June 30, 2001). Sitting en banc, the Texas Court of Criminal Appeals ("CCA") unanimously affirmed the conviction and death sentence. *Murphy v. State*, 112 S.W.3d 592 (Tex. Crim. App. June 25, 2003), *cert. denied*, 541 U.S. 940 (2004). During the pendency of his direct appeal, Murphy filed his first postconviction application for a writ of habeas corpus in the state trial court in cause number W-00-02424-A on May 12, 2003. (State Habeas Clerk's Record, "SHCR," at 2). The CCA adopted the trial court's findings of fact and conclusions of law to deny relief. *Ex parte Murphy*, No. WR-70,832-01 (Tex. Crim. App. Mar. 25, 2009).

Murphy filed his original petition for a writ of habeas corpus in this Court on January 28, 2010, which included a request to stay these proceedings to exhaust his claims of (1) suppression of evidence and use of false testimony by the prosecution, (2) ineffective assistance of counsel at the punishment stage, and (3) ineffective assistance of counsel at the guilt-innocence stage. (Pet., doc. 1; Pet. Br., doc. 3.) Respondent filed his "Non-Opposition to Petitioner Murphy's Motion to Stay and Abate Proceedings" (doc. 9). The Court found

that this agreement complied with *Rhines v. Weber*, 544 U.S. 269 (2005), and stayed these proceedings to allow Murphy to exhaust these claims. (Order, doc. 10.) Following abeyance, Murphy filed a subsequent state habeas application which was dismissed by the CCA as an abuse of the writ following a remand and evidentiary hearing, and Murphy returned to this Court. *Ex parte Murphy*, No. WR-70832-02, 2012 WL 982945 (Tex. Crim. App. March 21, 2012) (per curiam).

The day before the CCA dismissed the subsequent state habeas application, the Supreme Court issued its opinion in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), creating an exception to procedural bar for claims of ineffective assistance of trial counsel that were not presented to the state court in the initial-review collateral proceedings because of the ineffective assistance of state habeas counsel. The following year, this exception was applied to Texas cases in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Because Murphy's current counsel allege that they represented Murphy before the CCA in the original state habeas proceedings and such allegation has support in the record, this case was referred to the United States Magistrate Judge for hearing, if necessary, and recommendation or determination to this Court on the question of whether Murphy desires the appointment of new, independent counsel to investigate whether any claims were not presented to the state court under *Martinez v. Ryan* because of the ineffective assistance of any attorney representing Murphy in this Court. (Mem. Op. & Order, doc. 24.) After Murphy and his counsel filed their

notice of non-opposition (doc. 26), the Magistrate Judge appointed Don Vernay as independent counsel. (Order, doc. 30.)

Vernay investigated this case, consulted with Murphy regarding the results of his investigation, and made a report to the Court.[1] (Report, doc. 34.) In his report, Vernay concluded that (1) "trial counsel conducted a vigorous, thorough and extremely competent pretrial investigation, voir dire and defense at trial in both the guilt and punishment phases," (2) "federal habeas counsel also investigated the Petitioner's case thoroughly and competently" and raised the ineffective assistance of counsel claims considered meritorious, (3) Murphy "is completely satisfied with the performance of his current counsel" and wishes to keep them as his attorneys of record, and (4) independent counsel could "find no additional cognizable claims of ineffective assistance of trial counsel that could or should have been raised by current habeas counsel in a state successor petition for habeas corpus or an amended federal petition for habeas corpus." (Report at 9-10.) The Magistrate Judge reviewed that report and recommended that it be accepted by this Court. (Recommendation, doc. 35.) No objections have been made to the findings and recommendation of the Magistrate Judge.

This Court has reviewed the Findings, Conclusions and Recommendation of the Magistrate Judge

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[1] Independent counsel actually made a report (doc. 33) and filed an amended report (doc. 34) the next day. For simplicity, the amended report is referred to in this order as the report.

(doc. 35) and the report of independent counsel (doc. 34), and ADOPTS the recommendation to accept the report of independent counsel.

II. FACTUAL BACKGROUND

The state court described the facts of the offense as follows:

> During the afternoon hours of Wednesday, October 4, 2000, Murphy kidnapped, robbed, and murdered 80-year-old Bertie Cunningham while Ms. Cunningham was on her way home from shopping at the Collin Creek Mall in Plano. Murphy forced Ms. Cunningham into the trunk of her car and shot her in the head. (RR47: 23-31, 44-47; RR49: 42-44). The medical examiner testified that although Ms. Cunningham's wound was fatal, her death was not instantaneous; she may have lived for several minutes or longer in a comatose state. (RR49: S0[sic]-51, 58-59).
>
> Immediately after the shooting, Murphy repeatedly attempted to withdraw money from Ms. Cunningham's bank account using her ATM card. These attempts failed, but over the next two days, Murphy successfully used Ms. Cunningham's credit cards at various retail and restaurant locations. (RR47: 150-52, 156-61).
>
> Shortly after shooting Ms. Cunningham and while she was still in the trunk, Murphy picked up his niece and two of her teenage friends and drove them around in Ms.

> Cunningham's car. He purchased beer for himself, then he purchased the two teenage boys motorized scooters from a Richardson sporting goods shop using Ms. Cunningham's credit card. (RR47: 89-99). The next day, Murphy drove to Van Zandt County to visit his friend Treshod Tarrant, and bought dinner, beer, and liquor. The police discovered Murphy at Tarrant's grandmother's house early the next morning and arrested him. (RR47: 202-211, 242-48; RR48: 78-80). Ms. Cunningham's vehicle was parked near the house.
>
> Upon his arrest, Murphy admitted he had dumped Ms. Cunningham's body in a creek. (RR48: 84-90). He led police to the location of the body and subsequently executed a written statement in which he claimed he accidentally shot Ms. Cunningham while forcing her into the trunk. (RR48: 175-84; State's Exhibit 47).

(Subsequent State Habeas Record ("SSHR") at 20-22.) These findings are entitled to deference. *See* 28 U.S.C. § 2254(e)(1).

III. CLAIMS

Murphy presents five claims for relief, arguing:

1. The prosecution suppressed evidence that the victim of an extraneous offense admitted at the punishment stage she was uncertain regarding Murphy's identity, and presented false evidence that she was certain (Am. Pet. Br. at 28-36);

2. Murphy was deprived of the effective assistance of counsel at the punishment phase of his trial (Am. Pet. Br. at 36-58);

3. Murphy was deprived of the effective assistance of counsel at the guilt/innocense [sic] phase of his trial (Am. Pet. Br. at 58-64);

4. The trial court violated Murphy's rights under the Fourteenth Amendment when it excused venireperson Treat for cause (Am. Pet. Br. at 65-70); and

5. Murphy's counsel was prohibited from asking proper questions regarding victim impact and character evidence during the voir dire examination (Am. Pet. Br. at 70-74).

Murphy also requests an evidentiary hearing on the ineffective-assistance-of-counsel claims (Am. Pet. Br. at 26-27, 75). Respondent asserts that the first three claims are defaulted and procedurally barred and in the alternative that they lack merit. (Ans. at 22-63, 72-75, 82-84, 87-88, 90-92, 96, 98.) Respondent also asserts that the fourth and fifth claims lack merit and were properly denied by the state court. (Ans. at 103-114.)

IV. STANDARD OF REVIEW

Federal habeas review of these claims is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

This statute sets forth the preliminary requirements that must be satisfied before reaching the merits of a claim made in a federal habeas proceeding.

A. Exhaustion

Under this statute, a federal court may not grant habeas relief on any claim that the state prisoner has not first exhausted in the state courts. *See* 28 U.S.C. § 2254(b)(1)(A); *Harrington v. Richter*, 562 U.S. 86, 103 (2011). However, the federal court may deny relief on the merits notwithstanding any failure to exhaust. *See* 28 U.S.C. § 2254(b)(2); *Miller v. Dretke*, 431 F.3d 241, 245 (5th Cir. 2005).

B. State-Court Procedural Determinations

If the state court denies a claim on state procedural grounds, a federal court will not reach the merits of the claim if it determines that the state-law grounds are independent of the federal claim and adequate to bar federal review. *See Sawyer v. Whitley*, 505 U.S. 333, 338 (1992); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). If the state procedural determination is based on state grounds that were inadequate to bar federal habeas review, or if the habeas petitioner shows that an exception to the bar applies, the federal court must normally resolve the claim without the deference that 28 U.S.C. § 2254(d) otherwise requires. *See Miller v. Johnson*, 200 F.3d 274, 281 n.4 (5th Cir. 2000); *but see Busby v. Dretke*, 359 F.3d 708, 721 n.14 (5th Cir. 2004) (affording deference to merits finding when state court

"invoked a procedural bar as an alternative basis to deny relief"); *Rolan v. Coleman*, 680 F.3d 311, 319 (3rd Cir. 2012) (holding that "AEDPA deference [under § 2254(d)] applies when a state court decides a claim on procedural grounds and, alternatively, on the merits").

C. State-Court Merits Determinations

If the state court denies a claim on the merits, a federal court may not grant relief unless it first determines that the claim was unreasonably decided by the state court, as defined in § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. In the context of § 2254(d) analysis, "adjudicated on the merits" is a term of art referring to a state court's disposition of a case on substantive rather than

procedural grounds. *Green v. Johnson*, 116 F.3d 1115, 1121 (5th Cir. 1997). This provision does not authorize habeas relief, but restricts this Court's power to grant relief to state prisoners by barring claims in federal court that were not first unreasonably denied by the state courts. The AEDPA limits rather than expands the availability of habeas relief. *See Fry v. Pliler*, 551 U.S. 112, 119 (2007); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Richter*, 562 U.S. at 98. "This is a 'difficult to meet,' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court rulings be given the benefit of the doubt.'" *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (internal citations omitted) (quoting *Richter*, 562 U.S. at 102, and *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*)).

Under the "contrary to" clause, a federal court is not prohibited from granting federal habeas relief if the state court either arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *See Williams*, 529 U.S. at 412-13; *Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir. 2000). Under the "unreasonable application" clause, a federal court may also reach the merits of a claim on federal habeas review if [sic] "if the state court identifies the correct governing legal rule . . . but unreasonably applies it to the facts of the particular state

prisoner's case." *White v. Woodall*, 134 S. Ct. 1697, 1705 (2014) (quoting *Williams*, 529 U.S. at 407-408). "'[C]learly established Federal law' for purposes of § 2254(d)(1) includes only 'the holdings, as opposed to the dicta, of [the United States Supreme] Court's decisions.'" *Woodall*, 134 S. Ct. at 1702 (quoting *Howes v. Fields*, 132 S. Ct. 1181, 1187 (2012)). The standard for determining whether a state court's application was unreasonable is an objective one and applies to federal habeas corpus petitions that, like the instant case, were filed after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

Federal habeas relief is not available on a claim adjudicated on the merits by the state court unless the record before that state court first satisfies § 2254(d). "[E]vidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Pinholster*, 563 U.S. at 185. The evidence required under § 2254(d)(2) must show that the state-court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

V. ANALYSIS

A. Extraneous Offense Evidence

In his first claim, Murphy contends that the prosecution suppressed exculpatory evidence in violation of

Brady v. Maryland, 373 U.S. 83 (1963), and presented false evidence in violation of *Giglio v. United States*, 405 U.S. 150 (1972). (Am. Pet. Br. at 28-36.) Respondent asserts that this claim is procedurally barred and, in the alternative, lacks merit. (Ans. at 22-72.)

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S., at 87. In *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999), the Supreme Court set out three elements of a *Brady* claim: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." In *Giglio*, the Supreme Court condemned the knowing use of false testimony by the prosecution and made clear that the prosecutor's obligation to disclose exculpatory information under *Brady* extends to impeachment evidence. 405 U.S. at 153-55.

1. <u>Factual Background</u>

This claim is based on an extraneous offense described by the state court.

> At 11:30 a.m. on Tuesday, August 26, 1997, Sherryl Wilhelm was kidnapped from the parking lot of Arlington Memorial Hospital, where she was employed as a medical

> transcriptionist. (RR53: 127-134). The kidnapper forced her into the passenger side of her vehicle, choked her when she attempted to exit, and drove the car out of the parking lot. (RR53: 135-140). At the point Wilhelm believed the kidnapper would soon be entering the highway, she opened the passenger door and jumped. (RR53: 141-143). Wilhelm believed she spent approximately 30 minutes with the kidnapper. (RR53: 153-155). His face was not covered. (RR53: 133, 173).

(1 SSHR at 22.) Arlington police worked with Wilhelm to prepare a composite sketch of the perpetrator, and prepared a photo lineup, but nobody was identified until Wilhelm saw Murphy in news reports of his arrest for Bertie Cunningham's kidnapping and murder approximately three years later. (1 SSHR 22-23.) Wilhelm contacted Arlington Detective John Stanton the next morning to identify Murphy as her possible kidnapper. Stanton prepared a photo lineup in which Wilhelm identified Murphy.

The prosecution called Wilhelm, Stanton and the police artist as punishment witnesses in Murphy's trial to prove the extraneous offense. (53 RR 125-220.) Stanton testified to Wilhelm's photo identification of Murphy, and Wilhelm identified Murphy in the courtroom during the trial. The defense challenged the identification procedures and photo lineup used by Stanton in pretrial motions and a *sub rosa* hearing, arguing that the lineup was impermissibly suggestive, and procuring an admission from Stanton that Wilhelm "identified the photo spread because she saw the picture on

TV." (2 CR 443-449; 53 RR 124 (*sub rosa* hearing).) Defense counsel extensively cross examined Stanton and Wilhelm at trial, challenging her identification and suggesting that it was unreliable and based on her view of Murphy on TV and in the news rather than from the extraneous offense. (53 RR 149-173, 199-204.) Defense counsel also got Wilhelm to admit that she did not identify Murphy in the pretrial proceedings until after the prosecutor asked her to look around the room a second time and Wilhelm asked Murphy to remove his glasses. (53 RR 162-165; 1 SSHR 23-24.)

2. Claim

Murphy claims that the prosecution suppressed favorable evidence in violation of *Brady* and presented false evidence regarding Sheryl Wilhelm's punishment-phase identification of Murphy as the man who kidnapped her and stole her car. Specifically, Murphy complains that the prosecution did not reveal (1) that when Wilhelm viewed the photo spread, she said, "[t]his looks a lot like him and I'm pretty sure it's him" (Am. Pet. Br. at 33), (2) that the prosecution did not disclose the opinion of the investigator that it was a "strong tentative identification" of Murphy (Am. Pet. Br. at 34), (3) that the investigator did not file kidnapping charges because he could not determine whether Wilhelm identified the man that she saw on television a few days before or the man who kidnapped her more than three years before (Am. Pet. Br. at 34), and (4) that lead prosecutor Greg Davis and his investigator told Wilhelm before she testified that she had

identified the right man in the photo spread, thereby confirming in her mind the accuracy of her identification of Murphy (Am. Pet. Br. at 33).

3. State Court Proceedings

This claim was not raised in the initial postconviction state habeas proceedings, but was presented in subsequent state habeas proceedings. The CCA remanded the claim to the state district court on habeas review ("state habeas court") to determine whether to apply the procedural bar or to grant relief on the merits. *Ex parte Murphy*, No. WR-70,832-02, 2010 WL 3905152, at *1 (Tex. Crim. App. Oct. 6, 2010). The state habeas court conducted an evidentiary hearing and found that the factual basis of his claim was "known to the defense team or ascertainable through the exercise of reasonable diligence at the time of trial when Wilhelm and Stanton appeared, testified, and were subject to cross-examination regarding the reliability and certainty of Wilhelm's identification of Murphy," and also available to Murphy prior to filing his original state habeas application. (SSHR at 31.)

In the alternative, the state habeas court found that Murphy's claims lacked merit. Regarding Wilhelm's statement that "[t]his looks a lot like him and I'm pretty sure it's him," the state court found that this was a paraphrase, that she had actually said "this is him. I believe this is him. This looks a lot like him," and that she had made substantially similar statements in

her testimony at the time of trial.[2] (SSHR at 35.) The state court concluded that this evidence was neither withheld nor material under *Brady.* (SSHR at 36-38.)

Regarding the opinion of investigator Stanton that Wilhelm made a "strong tentative identification" of Murphy, the state court found that was not his actual opinion. The state court found that those were the words of the attorney speaking with Stanton on the phone and did not accurately reflect Stanton's opinion. (SSHR at 40-41.) Stanton testified before the state habeas court that his opinion was more accurately expressed in his testimony at the time of trial. (SSHR at 41-42.) The state court found Stanton's testimony to be truthful and concluded that this evidence was neither withheld nor material under *Brady.* (SSHR at 42.)

Regarding the reason that Stanton did not file the kidnapping charges against Murphy, the state court found that Stanton's decision not to submit the case was based on a variety of factors, including that Murphy had a pending charge for which he was subject to the death penalty and that three years had elapsed since the kidnapping occurred. (SSHR at 45.) The state

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[2] These findings included the following prior statements: Wilhelm's pretrial testimony that "[Stanton] just told me to take my time, and look at the pictures and – I just immediately saw the picture that I believed was him, and I pointed to it." (SSHR at 35); Wilhelm's testimony on cross-examination about why she picked Murphy's picture in the line-up that "[i]t was because he looked like the guy that abducted me. I thought that he looked like the guy that abducted me." (SSHR at 36). The state court found that, in fact, her 2009 statement was stronger than her prior statements at the time of trial. (SSHR at 36.)

court also found that Murphy's trial counsel knew that Stanton had not filed the kidnapping charges and obtained concessions from Stanton during cross-examination at trial that he thought Wilhelm's identification was influenced by having seen Murphy's photo on television. (SSHR at 43-44.) The state court concluded that this evidence was neither withheld nor material under *Brady*. (SSHR at 46.)

Regarding what lead prosecutor Greg Davis and his investigator told Wilhelm before she testified, the state court found that Wilhelm was not certain about what they said, but testified at the subsequent habeas hearing that when she asked the prosecutor about her identification of the guy in the photo lineup, she meant to ask whether she had identified the same person Dallas County was prosecuting for Bertie Cunningham's murder. (SSHR at 47.) Wilhelm also testified that she knew that the prosecutor had no way of knowing who her attacker was because she was the only person who saw the attacker during the offense. (SSHR at 47.) The state court also believed the testimony of the prosecutor at the subsequent writ hearing that neither he nor his investigator told Wilhelm at the pretrial interview she had identified the "right man" in the photo lineup. (SSHR at 47.) The state court further found that the trial prosecutor purposefully avoided doing things that might influence or taint Wilhelm's identification of Murphy, and would have avoided informing Wilhelm in any way about the accuracy of her identification. (SSHR at 47-48.) The state court found that, in fact, Wilhelm told writ counsel during their interview that

she would have identified Murphy in the courtroom as her attacker regardless of her pretrial meeting with the prosecutor and the State's investigator, because she "knew it was him." (SSHR at 48.) The state court concluded that the evidence was neither withheld nor material under *Brady.* (SSHR at 48-49.)

The CCA reviewed the record of the hearing and the findings of the state habeas court and implicitly adopted them, stating: "[b]ased upon the trial court's findings and conclusions and our own review, we conclude that Applicant has failed to satisfy the requirements of Article 11.071, § 5 of the Texas Code of Criminal Procedure." *Ex parte Murphy*, 2012 WL 982945 at *1; *see also Bledsue v. Johnson*, 188 F.3d 250, 255-57 (5th Cir.1999) (subsequent unexplained orders upholding a lower court's judgment are considered to rest on the same reasoning); *Renz v. Scott*, 28 F.3d 431, 432 (5th Cir. 1994) (the CCA's order denying relief "on the findings of the trial court" adopting the express findings of the trial court applying a procedural bar); *Braswell v. Dretke*, No. 3:02-CV-0342-M, 2004 WL 2583605, at *14 (N.D. Tex. Nov. 12, 2004), report and recommendation adopted, No. 3:02-CV-0342-M, 2005 WL 1058865 (N.D. Tex. May 2, 2005) (CCA adopted state habeas court's finding when denying habeas petition on the findings of the trial court).

4. Analysis

In reviewing the claim found to be barred by the state procedural rule, the first issue is whether this

Court may reach the merits of this claim. If so, this Court must then determine whether it must defer to the state court's alternative merits analysis.

a. Procedural Bar

This Court will not reach the merits of a claim that the state court denied on independent and adequate state procedural grounds, unless the habeas petitioner shows that an exception to the procedural bar applies. *See Sawyer*, 505 U.S. at 338; *Coleman*, 501 U.S. at 729. The United States Court of Appeals for the Fifth Circuit has repeatedly "held that 'the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar.'" *Canales v. Stephens*, 765 F.3d 551, 566 (5th Cir. 2014) (quoting *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008)).

Murphy argues that good cause exists for this court to consider the merits of his prosecutorial misconduct claim because the prosecution was responsible for the evidence not being disclosed to the defense in time to be included in the evidence at trial or in the original state habeas proceedings. (Reply at 3 (citing *Banks v. Dretke*, 540 U.S. 668 (2004), and *Strickler*, 527 U.S. at 288-89.) Murphy also argues that, applying the rationale of *Martinez v. Ryan*, 132 S.Ct. at 1320 (majority opinion), 1321 (Scalia, J., dissenting), this evidence was not discovered in time to be presented in the original state habeas proceedings. (Reply at 4.)

In his argument, Murphy mentions the element of whether state habeas counsel is ineffective in failing to discover evidence, but it does not appear that he is making this as a contradictory assertion that the failure to discover this evidence was due to his own attorney and not the prosecutor. (Reply at 4.) It appears that he is merely making an argument that the rationale for *Martinez* is similar to the rationale for excusing a procedural default when the elements of *Brady* or *Giglio* are shown. To the extent that he is arguing for an extension of *Martinez* to include prosecutorial misconduct, his argument is rejected. He has provided no authority in support of such an extension of the limited exception recognized in *Martinez*, and current circuit precedent would not allow it. *See Speer v. Stephens*, 781 F.3d 784, 785 n.4 (5th Cir. 2015) (noting Supreme Court's emphasis on the limited nature of the exception to the procedural default rule); *In re Threadgill*, 522 F. App'x 236, 237 (5th Cir. 2013) (holding that the *Martinez* exception is narrow and does not extend beyond claims of ineffective assistance of trial counsel); *Reed v. Stephens*, 739 F.3d 753, 778 n.16 (5th Cir.) (declining to extend *Martinez* to claims of ineffective assistance of appellate counsel), *cert. denied*, 135 S. Ct. 435 (2014).

The evidence necessary to establish a *Brady* claim can, however, establish the cause and prejudice necessary to avoid the procedural default of that claim.

> "[C]ause and prejudice" in this case "parallel two of the three components of the alleged *Brady* violation itself." *Id.*, at 282, 119 S.Ct.

> 1936. Corresponding to the second *Brady* component (evidence suppressed by the State), a petitioner shows "cause" when the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence; coincident with the third *Brady* component (prejudice), prejudice within the compass of the "cause and prejudice" requirement exists when the suppressed evidence is "material" for *Brady* purposes. 527 U.S., at 282, 119 S.Ct. 1936. . . . Thus, if Banks succeeds in demonstrating "cause and prejudice," he will at the same time succeed in establishing the elements of his [] *Brady* death penalty due process claim.

Banks, 540 U.S. at 691. The CCA remanded this claim to the state habeas court for a determination on this question and the state habeas court conducted an evidentiary hearing. *Ex parte Murphy*, 2010 WL 3905152 at *1 (Tex. Crim. App. Oct. 6, 2010). The state court found that any such evidence would have been available to trial and initial state habeas counsel. (SSHR at 29-31.)

Murphy argues that "Wilhelm and Stanton would not have spoken with post-conviction counsel at the time that both the motion for new trial and the initial state habeas application had to be filed." (Reply at 4.) This appears to be based on statements from Wilhelm and Stanton that were considered by the state habeas court and go to the crux of its determination. The state habeas court granted an evidentiary hearing on this issue which allowed it to make the necessary

credibility determinations regarding these statements. In resolving those credibility issues, the state court found that, despite such statements, this evidence was available to Murphy's trial counsel and initial state habeas counsel. (SSHR at 29-31.) Murphy disagrees with the state court's resolution of this factual dispute (Reply at 2), but has not shown by clear and convincing evidence under 28 U.S.C. § 2254(e)(1) that these findings are incorrect.

After hearing the evidence and arguments of counsel, the state habeas court found that, to the extent that the evidence relied upon in support of this claim exists, such evidence would also have been available to trial and initial state habeas counsel. (SSHR 29-31.) These findings were adopted by the CCA and are entitled to deference under 28 U.S.C. § 2254(e)(1). *See Duncan v. Cain*, 278 F.3d 537, 541 (5th Cir. 2002) (holding that a federal court defers to a state court's finding made in imposing a procedural bar "unless rebutted by clear and convincing evidence.").[3] Because Murphy has not rebutted these findings by clear and convincing evidence, this Court finds that the state fact findings are correct.

No exception to procedural bar is shown and this claim is DENIED as barred.

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[3] The Court of Appeals in *Duncan* addressed a situation similar to Murphy's. In both cases, the state trial court conducted a hearing on the disputed factual issue upon which the procedural bar was imposed and made findings of fact that were relied upon by the state appellate court in imposing the procedural bar.

b. Alternative Merits Analysis

In the alternative, Murphy has not shown that his *Brady/Giglio* claim has merit. He argues that the state court findings are not entitled to deference because "the CCA dismissed the subsequent application without addressing the merits of the prosecutorial misconduct claim." (Reply at 5-6.) Even if this distinction were to control the application of § 2254(d), however, it would have no impact on the presumption of correctness required under § 2254(e)(1).

There are two AEDPA provisions that may require deference to state court findings. One applies to all factual findings made by a state court regardless of whether the finding is made in connection with a state court's procedural or merits determination.

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C.A. § 2254(e)(1). This presumption would apply to any factual findings made by a state court, regardless of whether they are alternative findings. *See Valdez v. Cockrell*, 274 F.3d 941, 949-50 (5th Cir. 2001) (applying the § 2254(e)(1) presumption to state court findings made without a full and fair hearing); *Hudson v. Quarterman*, No. CIV A H-06-1901, 2007 WL 760366, at *7 (S.D. Tex. Mar. 8, 2007) (applying the § 2254(e)(1)

presumption to alternative findings). Further, it appears that even the deference required under § 2254(d) applies to alternative findings.[4]

The United States Court of Appeals for the Fifth Circuit has held that when a state court adjudicates a claim on the merits, the fact "[t]hat the state habeas court also invoked a procedural bar as an alternative basis to deny relief does not deprive the state of the benefit of AEDPA's deferential standard" under § 2254(d). *Busby*, 359 F.3d at 721 n.14. The Court of Appeals has also applied the deference standard in § 2254(d) to alternative merits findings in an unpublished opinion, approving of the district court's application of that same standard. *See Battaglia v. Stephens*, 621 F. App'x 781, 783 (5th Cir. 2015)*, cert. denied*, 136 S. Ct. 803 (2016).

The other circuits to address the issue have concluded that the deference standard of § 2254(d) should be afforded to alternative merits findings, even when the primary disposition is procedural. *See Rolan*, 680

[4] AEDPA deference under § 2254(d) controls federal review of a state court's adjudication of the merits of a claim, even in the absence of specific factual findings. This provision "does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits'" and, therefore, entitled to deference. *Richter*, 562 U.S. at 100. Therefore, while § 2254(e)(1) would apply only to actual findings of fact made by a state court, § 2254(d) would apply to the state court's ultimate decision and require the federal court to presume any reasonable basis to uphold it. "If there is any objectively reasonable basis on which the state court could have denied relief, AEDPA demands that we respect its decision to do so." *Amos v. Thornton*, 646 F.3d 199, 205 (5th Cir. 2011).

F.3d at 319 (applying AEDPA deference under § 2254(d) "when a state court decides a claim on procedural grounds and, alternatively, on the merits"); *Stephens v. Branker*, 570 F.3d 198, 208 (4th Cir. 2009) ("we agree with our sister circuits that an alternative merits determination to a procedural bar ruling is entitled to AEDPA deference" under § 2254(d)); *Brooks v. Bagley*, 513 F.3d 618, 624-25 (6th Cir. 2008) (holding that the state "court's alternative merits ruling receives AEDPA deference" under § 2254(d)); *Zarvela v. Artuz*, 364 F.3d 415, 417 (2d Cir. 2004) (affording deference under § 2254(d) when state court found "claim to be unpreserved, and, in any event, without merit"); *Johnson v. McKune*, 288 F.3d 1187, 1192 (10th Cir. 2002) (affording deference under § 2254(d) when "the state court relied on the merits as an alternative basis for its holding"). *Crawford v. Head*, 311 F.3d 1288, 1324 (11th Cir. 2002) ("Given that the state court rejected the claim both on the merits . . . and on the basis of a procedural default . . . , we must consider whether either of these grounds is reasonable and entitled to deference pursuant to § 2254(d)(1).").

The state habeas court found that the evidence relied upon by Murphy in making this claim was available to his trial and initial state habeas counsel and, therefore, should be dismissed on state procedural grounds. (SSHR at 29, 31.) It found, in the alternative, that each of these claims should be denied on their merits. (SSHR at 32-55.) Although the CCA used language necessary for the federal court to respect its independent procedural grounds, it clearly relied upon

the state habeas court's findings and did not exclude any from its disposition. *Ex parte Murphy*, 2012 WL 982945 at *1. Therefore, the deference required by § 2254(d) should apply in the instant case.

Murphy has not overcome the presumption of correctness set forth in § 2254(e)(1) to the specific factual findings made by the state court, much less the high AEDPA deference required under § 2254(d). Murphy relies upon the argument that AEDPA deference does not apply to the state court findings and does not show that they are incorrect, much less by clear and convincing evidence. Since Murphy has not rebutted the presumption of correctness afforded the state court findings under § 2254(e)(1), this Court finds that Murphy has not shown that any exculpatory evidence was withheld by the prosecution or that the evidence in question was material under *Brady* or that the state's evidence was false. Further, the state habeas court's alternative merits adjudication has not been shown to be an unreasonable application of federal law or based on an unreasonable determination of fact under § 2254(d). Accordingly, if Murphy's first claim were not dismissed as procedurally barred, it would be denied for lack of merit.

B. Effective Assistance of Counsel – Punishment Stage

In his second claim, Murphy contends that he was deprived of the effective assistance of counsel in the punishment phase of his trial. (Am. Pet. Br. at 36-58.)

Respondent asserts that this claim is procedurally defaulted and, in the alternative, meritless. (Ans. at 72-92.)

1. Claim

Murphy complains that his trial counsel (1) failed to present testimony regarding the distances between particular locations to rebut extraneous offense allegations, (2) failed to correct the false impression that the prosecution created on cross-examination of psychologist Mary Connell regarding the interpretation of certain mental health test results, (3) made an unsound strategic decision to call psychiatrist Jaye Crowder to testify and opened the door to prejudicial testimony, (4) failed to object to Detective Matt Myers' opinion testimony that petitioner was lying about not remembering the location of the abduction, and (5) failed to object to the prosecutor's argument that petitioner told the police that the shooting was an accident in an effort to be acquitted. (Am. Pet. Br. at 38-54.) Respondent contends that this claim is procedurally defaulted because it was not presented in the original state habeas proceedings and was subsequently found to be barred by the Texas abuse-of-the-writ rule. (Ans. at 74-75, 82, 84, 88, 91.) Murphy responds that the claim comes within the exception to procedural bar set created in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). (Reply at 8-16.)

2. State Court Proceedings

This claim was not raised in the initial state habeas proceedings, but was presented in subsequent state habeas proceedings. The CCA found that Murphy had not met the criterion under state law for a subsequent habeas application on this claim and dismissed it as an abuse of the writ under Article 11.071, § 5 of the Texas Code of Criminal Procedure. *See Ex parte Murphy*, 2010 WL 3905152 at *1; *Ex parte Murphy*, 2012 WL 982945 at *1.

3. Analysis

a. Procedural Bar

Respondent asserts that this claim is procedurally defaulted, and Murphy acknowledges that it was not presented to the state court in the original state habeas proceeding. The CCA's dismissal of this claim as an abuse of the writ is consistent with its application of the Texas abuse-of-the-writ doctrine as an independent and adequate state ground for imposing a procedural bar in federal court. *See Canales*, 765 F.3d at 566; *Hughes*, 530 F.3d at 342. Murphy relies entirely on *Martinez* in arguing that this claim comes within an exception to procedural bar. (Reply at 8-16.)

To show that a claim comes within this exception, a federal habeas petitioner must show that a substantial claim of ineffective assistance of trial counsel was not presented to the state court in the initial-review collateral proceeding, either because there was no counsel or because counsel in that proceeding was

ineffective. *Martinez*, 132 S. Ct. at 1320. The habeas petitioner must "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 1318-19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue)). To determine whether a claim has some merit, this Court applies the two-pronged standard by which a claim of ineffective assistance of counsel is measured as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The first prong of *Strickland* requires the defendant to show that counsel's performance was deficient. *Id.* at 687. The second prong of this test requires the defendant to show prejudice resulting from counsel's deficient performance. *Id.* at 694. The court need not address both prongs of the *Strickland* standard if the complainant has made an insufficient showing on one. *Id.* at 697.

In demonstrating that counsel's representation was deficient, a petitioner must show that counsel's representation fell below an objective standard of reasonableness. *Id.* at 687-88; *Lackey v. Johnson*, 116 F.3d 149, 152 (5th Cir. 1997). "It is well settled that effective assistance is not equivalent to errorless counsel or counsel judged ineffectively by hindsight." *Tijerina v. Estelle*, 692 F.2d 3, 7 (5th Cir. 1982). A court reviewing an ineffectiveness claim must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional competence or that, under the circumstances, the challenged action might

be considered sound trial strategy. *Gray v. Lynn*, 6 F.3d 265, 268 (5th Cir. 1993); *Wilkerson v. Collins*, 950 F.2d 1054, 1065 (5th Cir. 1992). There are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Richter*, 562 U.S. 106. In *Richter*, the Supreme Court noted the "wide latitude counsel must have in making tactical decisions" and the need to avoid judicial second-guessing. *Id.* (quoting *Strickland*, 466 U.S. at 689). "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Id.* at 110.

To satisfy the second prong of the *Strickland* test, the petitioner must show that counsel's errors were so egregious "as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The test to establish whether there was prejudice is whether "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability under this test is "a probability sufficient to undermine confidence in the outcome." *Id.*

As set out in the alternate merits analysis below, this claim, including each of its subparts, does not have any merit.[5] And although Murphy's original state

[5] This Court's findings when granting the agreed stay to exhaust these claims that these allegations, if true, would "not

habeas counsel may not have diligently represented Murphy in those proceedings, such counsel could not be found ineffective for the purpose of the *Martinez* exception for failing to present a meritless claim. *See Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013) (agreeing with the district court that "habeas counsel was not ineffective in failing to raise [a] claim at the first state proceeding" because "there was no merit to [the petitioner's] claim"); *Beatty v. Stephens*, 759 F.3d 455, 466 (5th Cir. 2014); *Braziel v. Stephens*, No. 3:09-CV-1591-M, 2015 WL 3454115, at *10 (N.D. Tex.), *certificate of appealability denied*, 631 F. App'x 225 (5th Cir. 2015), *cert. denied*, No. 15-8317, 2016 WL 777411 (May 2, 2016). Therefore, the claim is DENIED as barred.

b. Alternative Merits Analysis

In the alternative, Murphy has not shown that his claim, or any of its subparts, has merit.

1. <u>Testimony Regarding Distances</u>

Murphy complains that his trial counsel failed to introduce testimony regarding the actual distances and times needed for him to log out from work, travel to commit two extraneous offenses in two different cities and then return to work by the time he logged back in. (Am. Pet. Br. at 38-41.) The distances and times that

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appear to be plainly meritless" (Order, doc. 10, at 5) are, following further analysis, hereby withdrawn.

he contends it would have taken do not exclude him from the possibility of having committed those offenses, and his trial counsel presented this logistical challenge at trial, introducing evidence of its impracticality and arguing the unlikelihood that he committed those offenses.

The defense attempted to prove that a different man kidnapped Sheryl Wilhelm in Arlington. They brought out evidence at trial that Wilhelm's car was found broken down in Wichita Falls the next morning having documents in it from Marjorie Ellis (53 RR at 172-73; 57 RR at 22-24), who had also been assaulted at the Braum's in Wichita Falls and had her purse stolen at 8:30pm on the day of Wilhelm's kidnapping. (57 RR at 14, 32.) They brought out evidence regarding the locations and times of these different events (53 RR at 205-208; 57 RR at 14, 18-20, 22, 29-30, 34), the fact that Wilhelm's car appeared broken down (57 RR at 30), and also a description of the suspect in Wichita Falls that did not match Murphy (57 RR at 31). They also presented evidence from the diary of Chelsea Willis indicating normal days that Murphy would stay home during the day and work regular night shifts both nights before and after these extraneous offenses (57 RR at 118-19, 134-35). This allowed trial counsel to argue that Murphy could not have committed these offenses and also worked normally for both of those shifts, especially since no mention of his absence was reflected in Chelsea's diary. (60 RR 26-29, 43.)

Murphy argues that trial counsel was ineffective for not also providing evidence of times that it would

take to normally drive these distances while obeying all traffic laws to show that it would have been physically possible for him to commit these offenses and make both of those shifts, but not likely. (Am. Pet. Br. at 39-40.) Focusing the jury's attention on this evidence may not have been a better trial strategy. In fact, it could raise more questions for the jury regarding things such as whether the suspect would have been observing all traffic laws and driving in the same manner as appointed counsel's law clerk. This additional evidence merely adds support to the evidence and arguments presented at trial to show the unlikelihood of committing these extraneous offenses. It does not show the impossibility of committing them.

In order to avoid the "distorting effects of hindsight," the United States Court of Appeals for the Fifth Circuit has cautioned: "We must be particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing." *Carty v. Thaler*, 583 F.3d 244, 258 (5th Cir. 2009) (quoting *Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000)); *see also Ward v. Stephens*, 777 F.3d 250, 265 (5th Cir.), *cert. denied*, 136 S. Ct. 86, 193 L. Ed. 2d 76 (2015). Murphy's claim also comes down to a matter of degrees, relying upon precisely the sort of judicial second-guessing that *Strickland* was intended to avoid, particularly in light of counsel's task "to balance limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 107. Even if this

additional evidence might have helped, Murphy has not provided any reason to believe that counsel was not making a reasonable strategic decision to not invest the additional time needed to gather this evidence. And it would not have changed the outcome of the trial, especially since it would not have shown an impossibility or that it was any more impractical than argued at trial. Accordingly, Murphy has not satisfied either prong of *Strickland*. If this portion of the claim were not procedurally barred, it would be denied for lack of merit.

2. Examination of Expert

In the second subpart to this claim, Murphy contends that trial counsel should have corrected the way that his own expert explained the interpretation of mental health test results to the jury. During the trial testimony of defense expert Mary A. Connell, Ph.D., the prosecutor cross-examined her regarding reports provided under the names of other experts, Dr. James Butcher and Dr. Theodore Millon. (Am. Pet. Br. at 42-44.) Murphy contends that Dr. Connell's testimony inaccurately explained the involvement of these other experts and resulted in a false impression created before the jury.

Murphy's trial counsel called Dr. Connell to provide mitigating evidence about Murphy, specifically regarding his tragic childhood and related mental impairments. On direct examination, Dr. Connell testified that she administered tests including the

Minnesota Multiphasic Personality Inventory, II (MMPI-II), and the Millon Clinical Multiaxial Inventory 3 (MCMI-III). (58 RR at 14-15.) These two tests indicated that Murphy suffered from various psychological ailments requiring treatment.

Dr. Connell explained at trial that she gave the MMPI-II test to Mr. Murphy and "scored the results with a computer system looking at the kind of clinical interpretation, how did he look compared to other people in a clinical setting." (58 RR at 15.) These results indicated that Murphy was extremely symptomatic.

> He subscribed to a broad range of symptoms, symptoms of depression, anxiety, physical ailments, aches and pains, physical distress, such as stomachache, headaches, back, neck. He subscribed to paranoid thoughts, feeling that people were out to get him or plotting to do harm to him, that he was suspicious and guarded, couldn't trust other people easily.

(58 RR at 16.) In describing the results of the MCMI-III, Dr. Connell explained,

> And again, Mr. Murphy subscribed to a broad range of symptoms. He described himself in fairly harsh terms, made no effort to try to look good on either of these instruments. . . .
>
> And so in both of these tests the results were suggestive of very, very disturbed functioning, extreme emotional distress, and a great many symptoms. In both cases these

> results would be results that would cause you to make a referral for psychiatric consultation and would probably result in a person being medicated.

(58 RR at 17.) Dr. Connell also conducted other testing and testified concerning Murphy's background and abuse, his father's abuse of his mother, his mother's abandonment of him, his placement in an orphanage and different homes, the abuse he endured from his first adoptive father, the break-up of his second adoptive family, his own marriage breaking down, his alcoholism, his feeling of falling into his father's pattern of abuse and alcoholism, his suicide attempts and placements for psychiatric treatment of his depression, psychosis and anxiety.

On cross examination, the prosecutor asked about a prior case where Dr. Connell testified as an expert for the defense in another capital murder trial. (58 RR at 70-71.) The prosecutor brought out Dr. Connell's potential bias and limited review of information that did not include certain medical records or direct consultations with law enforcement, victims, or any of Murphy's treating physicians or jail health care providers. (58 RR at 72-73.) And when she met persons accused of involvement in abusing Murphy, she did not question them about their alleged misconduct that she considered in making her opinions. (58 RR at 74-76.) The prosecutor also brought out ways in which Dr. Connell's prior testimony might be considered inaccurate or false, especially in light of information that she had

not reviewed that conflicted with her conclusions. (58 RR at 76-100.)

The prosecutor subsequently asked Dr. Connell about a report the expert obtained interpreting Murphy's answers to the MMPI-II.

> Q. Doctor, who is James N. Butcher?
>
> A. Butcher is probably the leading expert in the country on the interpretation of the MMPI.
>
> Q. In fact, Dr. Butcher, interpreted the MMPI-2 that was administered to Jedidiah Murphy, didn't he?
>
> A. Yes.

(58 RR at 104.) Similarly, when the prosecutor also asked Dr. Connell about an exhibit and "whether or not that is the report produced by Dr. Millon in this case," she responded "Yes, it is." (58 RR at 111.)

During habeas review, Dr. Connell provided an affidavit complaining about her testimony during the prosecutor's examination.

> The cross-examination left the impression with the jury that Drs. Butcher and Millon personally evaluated Murphy's test results and reached the conclusions about which I testified. This impression was false as neither doctor examined Murphy evaluated his test results reached conclusions about him or prepared a report.

(SSHR at 160.) Murphy now complains that his trial counsel did not expose during their redirect examination before the jury how this testimony by their own defense expert on mitigation was "false." (Am. Pet. Br. at 45-47.) However, that would not appear to have been necessary or an effective trial strategy.

Dr. Connell's post-trial affidavit recites that portion of each report that included a "cautionary statement" about its use and complained that this was not brought out before the jury, but the record indicates that it was. Both of these reports, including the cited language, were admitted before the jury. (58 RR at 108, 111.) Following the admission of a report, the prosecutor pointed out unfavorable parts of these reports and asked Dr. Connell to explain their significance to the jury. Regarding the first conclusion discussed in "Dr. Butcher's report," the following exchange occurred in which Dr. Connell specifically pointed out this cautionary statement in qualifying the nature of this report.

> Q. That was his – that was his conclusion, wasn't it?
>
> A. Exactly, yes. Well, it wasn't a conclusion. It was his hypothesis.
>
> Q. Well, that is his statement in this report?
>
> A. But if you notice on the beginning of the report, it says that the interpretation that is offered is not meant to be a final interpretation, that, interview, observation, and history should be taken into account and so forth. So he offers these as

> hypotheses. He gives those as some possible reasons. . . . And ***as I told you earlier***, I read through the items to try to understand which of those it might be.

(58 RR at 105) (emphasis added). This testimony appears to reference Dr. Connell's prior testimony where the prosecutor asked about the process for interpreting these test results.

> Q. Have you reviewed the answers that [Murphy] gave to you on that MMPI-2 [sic]?
>
> A. Not on all 567 items, but on a number of – what are called critical items that ***my computer interpretative program spits out*** to do some follow-up inquiry if you don't know what the person was referring to.

(58 RR at 103) (emphasis added). Regarding whether she reviewed Murphy's responses to the MCMI-III, Dr. Connell testified, "[a]gain, not all 175 of them, but instead the critical items that emerge as ***it's computer scored***." (58 RR at 116) (emphasis added).

Dr. Connell also qualified her answers to the specific statements from this report, explaining "that based upon [Murphy's] answers and his description of himself, that would be a hypothesis about his personality." (58 RR at 106.) Dr. Connell also corrected the prosecutor's use of the report to assert certain conclusions that these were not final interpretations but merely guides for follow-up inquiries.

> You also left out, when you were reading in paragraph 2, number of personality characteristics associated with substance abuse or substance use problems, that the next sentence says, His scores on the addiction proneness indicators suggest that there is a possibility of his developing an addictive disorder. Further evaluation for the likelihood of a substance use or abuse disorder is indicated.

(58 RR at 107.) Dr. Connell also explained that a suggested hypothesis, that such a person would not acknowledge his problems or submit to treatment, could not be applied to Murphy and was being used incorrectly by the prosecutor.

> And of course, we know that one is wrong, that is, that Mr. Murphy did in fact present himself for treatment on his own on at least one occasion. And then the very next line where you left off is: "This MMPI – 2 [sic] interpretation can serve as a useful source of hypotheses about clients." ***The hypotheses that are generated here*** are generated on the basis of Mr. Murphy's own admission of the problems and characteristics that you just summarized.

(58 RR at 110) (emphasis added).

Dr. Connell's examination regarding these reports showed that they included general statements about personality types rather than specific evaluations of the facts of Murphy's case. And the prosecutor's questions reading from the report generally addressed certain personality types that were identified and the

behavioral tendencies connected with those types. After explaining the normal application of these tests, Dr. Connell also explained the limited purpose for these interpretive reports as aids to help know what to look for but not as containing an opinion or diagnosis of an individual's condition. "I don't know that these results should be considered definitive for diagnosis, for example. I find them useful in elucidating or illuminating some of his personality characteristics. . . ." (58 RR at 113.) Toward the end of the cross-examination, the prosecutor specifically invited Dr. Connell to provide any additional information that "would help the jury in understanding this testing." (58 RR at 127.) Throughout her testimony, Dr. Connell was given the opportunity to explain, and did explain, the proper application of the information in these reports.

The topics and content of an attorney's examination of a witness is a matter of trial strategy. *See Hamilton v. United States*, No. 7:10-CR-117-H, 2014 WL 6977757, at *2 (E.D.N.C. Dec. 9, 2014) ("The adequacy and content of the cross-examination is a matter of trial strategy within this category of claims."); *Kleinberg v. United States*, No. 00 CIV. 3621 (SHS), 2000 WL 686213, at *1 (S.D.N.Y. May 25, 2000) ("Although Kleinberg complains that the attorney did not cover certain areas, the subject of cross examination is a question of trial strategy for the defense attorney."); *Hemetek v. United States*, No. 3:08-CR-00198, 2012 WL 3870620, at *11 (S.D.W. Va. Apr. 25, 2012), *report and recommendation adopted*, No. CIV.A. 3:11-0579, 2012 WL 3870605 (S.D.W. Va. Sept. 6, 2012), *aff'd*, 527

F. App'x 261 (4th Cir. 2013) ("The content of cross-examination is a strategic judgment, squarely within the province of trial counsel.").

"Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so." *Rockwell v. Davis*, No. 4:14-CV-1055-O, 2016 WL 4398378, at *12 (N.D. Tex. Aug. 18, 2016) (quoting *Smith v. Cockrell*, 311 F.3d 661, 676-77 (5th Cir. 2002), overruled on other grounds by *Tennard v. Dretke*, 542 U.S. 274 (2004)). Counsel should not be expected to know better than their own experts regarding matters within the expert's area of expertise "[s]hort of hiring another expert to evaluate the first experts." *United States v. Gray*, 37 M.J. 730, 746-47 (A.C.M.R. 1992), *supplemented*, 37 M.J. 751 (A.C.M.R. 1993), *and aff'd*, 51 M.J. 1 (C.A.A.F. 1999).

Dr. Connell repeatedly explained the nature of these reports and the limited use that was proper. To the extent that Dr. Connell did not provide information that she was called upon to give at trial and that she now contends was needed to explain her testimony, Murphy has not provided sufficient reason to believe it to be anything other than a reasonable trial strategy to decline from attempting to prove that your own expert's testimony was "false," unless ethically required to do so. In fact, such an attempt was not necessary because the relevant qualifying information was

already before the jury, and the prosecutor's cross-examination attempted to show how her testimony was inaccurate and "false." And because Dr. Connell explained these reports, the correct information was before the jury. Counsel's failure to have her repeat those explanations or elaborate on them would not be prejudicial.

Murphy has not shown either the deficiency or the prejudice prong of *Strickland.* If this portion of the claim were not procedurally barred, it would be denied for lack of merit.

3. Decision to Call Expert

Murphy contends that trial counsel made an unsound tactical decision to call an expert that ended up testifying in such a way that prejudicial information about him was put before the jury. (Am. Pet. Br. at 48-52.) Murphy concedes that counsel's decision was a strategic one, but argues that there was no sound strategic reason to call the expert at trial. (Am. Pet. Br. at 50.)

Trial counsel called Jaye Douglas Crowder, M.D., during the punishment stage of his trial. Dr. Crowder was a psychiatrist with impressive credentials, including a faculty position at the University of Texas Southwestern Medical School in Dallas and peer recognized in professional associations and publications. (58 RR at 133-34.) He diagnosed Murphy as having major depression and dysthymic disorder. (58 RR at 135.) In addition, Murphy suffered from alcohol dependence,

narcissistic and borderline personality disorder with some antisocial features. (58 RR at 136.) Dr. Crowder also explained the significance of these disorders to the jury. He also was able to clear up matters brought out by the prosecutor in the cross examination of the defense psychologist, Dr. Connell. Dr. Crowder provided confirmation in the records of an attention deficit disorder diagnosis that the prosecutor had previously criticized in the cross examination of Dr. Connell as unconfirmed. (58 RR at 95-96, 137.) And Dr. Crowder testified that Murphy did not have psychopathy that the prosecutor had tried to establish in the cross examination of Dr. Connell. (58 RR at 118-23, 138-39.)

Dr. Crowder provided a different explanation for Murphy's criminal behavior. He explained with visual aids the significance of Murphy having been abandoned as a child, not growing up with a father figure, and the resulting problems from abandonment and being passed around from home to home, such as heightened insecurity, inability to trust authority, and borderline personality disorder. (58 RR at 139-41.) He brought together numerous factors arising from Murphy's tragic circumstances and alcoholism that impacted his neurological system and ability to make decisions. (58 RR at 141-46.) He also explained to the jury the meaning of certain records, the significance of certain witness interviews (58 RR at 147-71), and that there was hope for Murphy resulting from available treatment in a controlled environment. (58 RR at 146-47.)

On initial cross-examination, Dr. Crowder was asked about the facts and his opinions in several capital murder cases where he had previously testified as an expert. (58 RR at 176-82.) He was also asked about his hourly rate, whether he had personally interviewed certain law enforcement officials and health care providers or had just read their records, and whether certain extraneous offense allegations would change his opinions. (58 RR at 182-84, 91-92.) He was also asked about certain records from a children's shelter and whether they would change his opinions. (58 RR at 184-88.) He was also asked about certain neuropsychological tests he ordered that detected no brain damage. (58 RR at 188-91.) He was also asked for his opinions about the victim's emotions in the event that she was aware of what was happening. (58 RR at 192-93.)

Before this Court, Murphy emphasizes Dr. Crowder's testimony on cross-examination regarding future dangerousness. "Counsel hired Dr. Crowder to evaluate whether petitioner would be dangerous in the future. Because the evaluation was unfavorable, there was no sound strategic reason to call Dr. Crowder." (Am. Pet. Br. at 50.) The actual testimony, however, was that Murphy would not likely be a future danger in prison. The prosecutor got Dr. Crowder to acknowledge his prior testimony that outside of a prison setting, he would be "concerned" about Murphy, but not in prison. (58 RR at 199-201.)

> Q. So as far as you're concerned, when it comes to Mr. Murphy, we just cannot predict what he is going to do in the future?

> A. We can look at the odds though, and the odds are against his future dangerousness in prison.

(58 RR at 199.) Murphy's counsel then immediately followed up on re-direct examination where Dr. Crowder testified that Murphy would not be eligible for parole for a minimum of 40 years. (58 RR at 202.)

While Murphy is correct that ***trial counsel*** did not elicit on direct examination the testimony from Dr. Crowder that Murphy would not be a future danger in prison, it does provide some support for Murphy's lack of future dangerousness that might actually have been more effective coming in the prosecutor's cross-examination. Murphy also complains of the prosecutor's efforts to impeach this opinion through his further cross-examination of Dr. Crowder, over objection, regarding the "Texas Seven," a group of inmates that escaped from prison and then committed a murder. (58 RR at 202-204.) Even so, Dr. Crowder also provided, during this same cross-examination, statistical information of a very low likelihood of such an escape. (58 RR at 203-204.) And Murphy's trial counsel brought out the absence of any sign pointing to Murphy as an escape risk and that he had not hurt anyone during his incarceration despite having the opportunity to do so. (58 RR at 204-205.)

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Murphy does not contend that his trial counsel had not

conducted an adequate investigation regarding whether to call Dr. Crowder to testify, but merely asserts that there was "no sound strategic reason" to call this witness because his opinion on future dangerousness was "unfavorable." (Am. Pet. Br. at 50.) The mitigating evidence Dr. Crowder brought out in his testimony on direct examination, however, would amply support counsel's reasons to call this psychiatrist. And Murphy has not established that the testimony in question was entirely unfavorable. Dr. Crowder testified that Murphy would not be a future danger in prison, where he would be kept. Murphy has not provided any reason to believe that counsel's decision to call Dr. Crowder was anything other than a reasonable strategic decision within the proper professional judgment of trial counsel. Therefore, if this portion of the claim were not procedurally barred, it would be denied for lack of merit.

4. Detective's Opinion Testimony

Murphy complains that his trial counsel failed to object to testimony elicited from a state's witness that he did not think Murphy was being truthful. Specifically, Murphy complains that the prosecutor elicited during the cross-examination of Garland Police Department Detective Matt Myers without objection that Myers did not think that petitioner was being "honest and genuine" when he said that he did not remember the location of the abduction. (Am. Pet. Br. at 52 (citing 59 RR at 125).)

Detective Myers was the lead detective in the case involving the death of Bertie Cunninham [sic]. (48 RR at 131.) Murphy's cooperation with the police had been an issue throughout the trial. During the guilt phase the prosecutor elicited testimony that Murphy was cooperative in waiving his rights to remain silent and responding to the detective's efforts to get information,[6] even after trial counsel had advised Murphy against it. (48 RR at 151-52, 159-62, 167-79, 193-95.) On cross examination, trial counsel got the detective to admit that he thought Murphy was truthful in trying to locate the scene of the abduction and shooting, an important matter for the state to prove.

> Q And did you think at that point that he was telling you the truth when he was telling you these things?
>
> A. Yes, I did.

(48 RR at 243.) In response, the prosecutor on redirect brought out that the detective's opinion about Murphy's truthfulness changed over time. (48 RR at 255.)

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[6] On direct examination by the prosecutor, Detective Myers testified that Murphy "said that he – he didn't want to hide anything, that he wanted to cooperate with us, and that he would answer any questions that I had for him." (48 RR at 171.) Murphy had been quiet in the car, but when he got to the police station, "He immediately opened up, said that he wanted to cooperate, was very talkative and easy to talk to from that point on really." (48 RR at 195.)

During the punishment stage, trial counsel got this detective to admit that Murphy was cooperative and remorseful.

> Q. And when you were asking him questions, isn't [it] true that when he was answering you, he was forthright and direct?
>
> A. I thought he was some of the times.
>
> Q. Okay. And that again, he was also remorseful at times?
>
> A. Well, he was emotional and he did – you know, he cried.
>
> Q. But he was remorseful, you thought?
>
> A. Yes.
>
> Q. Okay. And is it true that the first thing that he told you was that he was the person that was responsible for Ms. Cunningham's disappearance and death?
>
> A. He did admit to that pretty quickly, yes.

(59 RR at 104.)

Trial counsel also got the detective to admit that Murphy freely wrote out answers to what he was deceived into believing was a letter from the victim's family asking questions about the murder. (59 RR at 105-14.) The detective testified to one part of the "letter" as follows:

> Q. The next question is: "The family would like to put up a cross or memorial stone

> either at the place you picked Bertie up or the place that she died. We need your help to get this done. Please tell me where you picked her up or where she died. This would be a marker that we could put up to show our love for Bertie, and that we still think about her." And what was his response to that?
>
> A. It says: "Sir or ma'am I'm very sorry for what has happened to your family. I've destroyed many many lives from this. I will continue to work with Mr. Myers so I can at least give you peace, but as of right now I can't remember."

(59 RR at 112.) Trial counsel also established that this "letter" was not written by any family member, but by unrelated police department personnel as an investigative tool to gather evidence against Murphy. (59 RR at 107-109.) In fact, they had not even informed the family that they would be using their identity in that manner. (59 RR at 109.)

Asking the detective about this portion of the "letter that you used as an investigative tool" with Murphy, the prosecutor appears to have phrased Murphy's answers that he thought he was making to the family as though they were statements to the detective.

> Q. And when he told you that he could not give you an abduction location for Ms. Cunningham, as you sit here today do you think he was being honest and genuine when he said he didn't remember?

A. No, I think he knows where the abduction site is.

(59 RR at 125.) Murphy argues that this testimony about the defendant's truthfulness is inadmissible and that no sound strategy could justify trial counsel's failure to object. (Am. Pet. Br. at 52-53.)

In support of his argument that the testimony was inadmissible, Murphy relies upon the rule against calling an expert to testify whether a testifying witness is truthful, particularly the child complaining witness in a sexual assault prosecution. (Am. Pet. Br. at 52 (citing *Schutz v. State*, 957 S.W.2d 52, 59 (Tex. Crim. App. 1997)).) In that case, the CCA held that "[e]xpert testimony does not assist the jury if it constitutes 'a direct opinion on the truthfulness' of a child complainant's allegations." *Schutz*, 957 S.W.2d at, 59. The rule is different when considering the defendant's character in determining punishment.

"A defendant's truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing." *United States v. Grayson*, 438 U.S. 41, 50 (1978), abrogation on other grounds recognized in *Barber v. Thomas*, 560 U.S. 474, 482 (2010); *McGee v. State*, 233 S.W.3d 315, 318 (Tex. Crim. App. 2007). The rule is even more relaxed in the punishment stage of a Texas capital murder trial. "Article 37.071, V.A.C.C.P. authorizes the trial court to admit any evidence which is relevant to a defendant's

deathworthiness and the jury is authorized to consider this evidence along with that adduced at the guilt-innocence stage of trial." *Burks v. State*, 876 S.W.2d 877, 909 (Tex. Crim. App. 1994).

Murphy has not shown that an objection would have excluded the testimony in question. "Failure to raise meritless objections is not ineffective lawyering; it is the very opposite." *Clark v. Collins*, 19 F.3d 959, 966 (5th Cir. 1994). Further, counsel's decision whether to challenge admission of evidence is a matter of trial strategy. *See Morales v. Thaler*, 714 F.3d 295, 305 (5th Cir. 2013) (noting that defense counsel does not render ineffective assistance by strategically forgoing a Confrontation Clause objection). Murphy has not provided any reason to believe that this is anything other than reasonable trial strategy.

Murphy has not shown that trial counsel's performance was deficient. If a habeas petitioner has not made an adequate showing on one of the prongs of *Strickland*, the court need not consider the other. 406 U.S. at 697. Even so, Murphy has not shown a reasonable probability that, but for trial counsel's failure to object, the result of the proceeding would have been different. *Id.* at 694. As explained above, Murphy has not shown that an objection would have prevailed, but even if it did, it would appear to have made little difference to the outcome of the trial.

Trial counsel elicited testimony from the detective in the guilt stage that Murphy was trying to be helpful and not evasive in answering the detective's questions.

(48 RR at 211.) In response, the prosecutor on redirect established that the detective did not think Murphy had always been truthful. (48 RR at 255.) In the punishment stage, trial counsel elicited testimony from the detective suggesting that Murphy had been forthright and cooperative. (59 RR at 104.) Murphy's trial counsel also exposed the deceitfulness of the police detective in using a certain "investigative tool." (59 RR at 107-109.) The prosecutor's attempt to show that the lead detective in the prosecution did not believe that Murphy was being entirely "honest and genuine" himself in his freely given answers to the deceitful investigative method would not appear to be particularly damaging testimony, particularly in light of the entirety of the detective's testimony and other evidence admitted. Considering the nature of the crime and other evidence of Murphy's bad acts, he has not shown that this testimony, even if improperly admitted, would have altered the result of his trial.

Murphy has not satisfied either prong of *Strickland*. If this portion of the claim were not procedurally barred, it would be denied for lack of merit.

5. Prosecutor's Argument

Murphy also complains of trial counsel's failure to object to the prosecutor's argument at the punishment stage to rebut Murphy's argument that he was cooperative and gave a confession. (Am. Pet. Br. at 53-54.) Specifically, Murphy complains that,

> The prosecutor argued without objection that, with regard to the defense assertion that petitioner was cooperative with the police, " . . . you have to know . . . that ***in this man's mind,*** . . . when he signs that statement and he says this was an accident, . . . if he can get one jury in Dallas County to buy that excuse, he walks smooth out of this courthouse, smooth out, not guilty, accident, forget it, and he's free again, isn't he?"

(Am. Pet. Br. at 53 (quoting 60 RR 47-48)) (emphasis added). Murphy argues that this misstates Texas law and that there is no sound trial strategy for failing to object to the prosecutor's misstatement of the law.

In making this argument, Murphy relies on *Andrews v. State*, 159 S.W.3d 98 (Tex. Crim. App. 2005), which addressed an argument regarding the law that was directly relevant to an issue before the jury in determining the length of the defendant's sentences, whether they could later be stacked.

> Under the extremely unusual circumstances of this case, the record contains all the information that we need to make a decision. Trial counsel failed to object to the prosecutor's misstatement of the law regarding whether the appellant's sentences could be stacked, even though he knew that the State had filed a motion to cumulate the sentences. There can be no reasonable trial strategy in failing to correct this false impression that was harmful to the appellant.

159 S.W.3d at 103. Murphy also relies upon *Ex parte Drinkert*, 821 S.W.2d 953, 955 (Tex. Crim. App. 1991), in which counsel's conduct in failing to object to the prosecutor's argument to consider the self-defense issue from the standpoint of the deceased victim that was contrary to the law and the court's charge that they were given. In each of these cases, the misstatement of law pertained to an issue directly before the jury.

In Murphy's case, however, the issue at the time of this argument was not whether he would "walk smooth out of the courthouse." (Am. Pet. Br. at 53.) The jury had already rejected the notion that the shooting was an accident by finding him guilty of having the specific intent to commit the murder. (1 CR at 169-70, 189.) They were no longer considering whether to let him go free. The prosecutor's argument at the punishment stage was solely to rebut the contention that Murphy had been cooperative in making a full confession. To do that, he argued what was in Murphy's mind, that he was trying to get out of trouble in making that statement, not whether it was legally effective to do so. The fact that Murphy was dead wrong in making that statement was of no moment. The point being made was that he was trying to avoid the prosecution.

Murphy has not shown that an objection to this argument would have been sustained, much less that it would have made any difference at his trial. Defense counsel may reasonably have wanted to avoid having the jury dwell on the prosecutor's argument by making an objection and letting the prosecutor argue further

about Murphy's intent in making the statement that the shooting was an accident, even if it would have resulted in a prosecutor having to revise his argument and avoid saying that Murphy had made that statement trying to "walk smooth out of the courthouse." It would appear perfectly reasonable to avoid focusing on an issue that the jury had already found against your client, even if the objection could have been sustained. And Murphy does not show any prejudice in that, even if an objection would have been sustained, it would have changed the result of the proceeding. Therefore, Murphy has not satisfied either prong of *Strickland.* Again, if this portion of the claim were not procedurally barred, it would be denied for lack of merit.

C. Effective Assistance of Counsel – Guilt/Innocence Stage

In his third claim, Murphy contends that he was deprived of the effective assistance of counsel in the guilt/innocence phase of his trial. (Am. Pet. Br. at 58-64.) Respondent asserts that this claim is procedurally defaulted and, in the alternative, meritless. (Ans. at 92-103.)

1. Claim

Murphy complains that his trial counsel (1) failed to object to testimony regarding petitioner's post-arrest silence, (2) opened the door to police opinion testimony that petitioner was not telling the truth, and (3) failed to object to argument that the jury had to

acquit petitioner of capital murder before it could consider the lesser included offenses.

2. State Court Proceedings

This claim was not raised in the initial state habeas proceedings, but was presented in subsequent state habeas proceedings. The CCA found that Murphy had not met the criterion for a subsequent habeas application on this claim and dismissed it as an abuse of the writ. *Ex parte Murphy*, 2012 WL 982945 at *1.

3. Analysis

a. Procedural Bar

As with the earlier claim, Respondent asserts that this claim is procedurally barred, and Murphy acknowledges that it was not presented to the state court in the original state habeas proceeding. The CCA's dismissal of this claim as an abuse of the writ is consistent with its application of the procedural bar in these situations where the Texas courts have consistently applied its abuse-of-the-writ doctrine as an independent and adequate state ground for imposing a procedural bar in federal court. *See Canales*, 765 F.3d at 566; *Hughes*, 530 F.3d at 342.

Murphy also argues that this claim comes within the exception to procedural bar created in *Martinez*. Again, as set out in the alternate merits analysis below, this claim, including its subparts, does not have any merit, and state habeas counsel is not ineffective

in failing to present meritless claims. *See Garza*, 738 F.3d at 676; *Beatty*, 759 F.3d at 466 (5th Cir. 2014). Therefore, the claim is DENIED as barred.

b. Alternative Merits Analysis

In the alternative, Murphy has not shown that his claim, or any of its subparts, has merit.

1. Testimony Regarding Silence

Murphy complains about testimony by Detective Myers commenting on Murphy's post-arrest silence for the purpose of showing that Murphy's silence suggested guilt. (Am. Pet. Br. at 58-60.) In addition to the procedural bar referenced above, Respondent asserts that this claim lacks merit. (Ans. at 92-96.)

Prior to trial, Murphy moved to suppress his statements on the basis that they were involuntary, coerced, and had been obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and of his constitutional rights to counsel and to remain silent. (1 CR 127-28.) Murphy also raised the issues in a *sub rosa* hearing during the trial. (48 RR at 2-20, 44-76.) Upon receiving the trial court's findings and conclusions overruling their objections and motion to suppress, trial counsel asked for the issue to be included in the jury charge and submitted to the jury. (48 RR at 76.) The trial court approved the request (48 RR at 76), and the issue was included in the charge. (1 CR at 175-79.) During the remainder of the guilt phase portion of the trial, the

prosecutor examined witnesses before the jury regarding the *Miranda* warnings given to Murphy, the officers' questioning of Murphy and his waiver of rights under *Miranda* before answering questions. Murphy's counsel also examined the lead detective regarding the fact that the police did not know where the offense had occurred despite their many attempts to get this information in connection with the prosecution's burden to prove that venue was proper in Dallas County. (48 RR at 252-53; 1 CR 179-81.)

The prosecutor presented evidence that Murphy was cooperative, waived rights and answered questions, but also that the officers would respect Murphy's refusal to answer questions. Murphy makes the following complaint about this evidence.

> Counsel elicited on cross-examination that the police conducted additional interviews with petitioner on October 7 and October 11 and that they attempted to interview him on October 13 to determine the locations of the abduction and the murder ([48] R.R. 252-53). The prosecutor elicited without objection on redirect examination that Myers advised petitioner of his rights and sought to interrogate him further on October 13, but he said that he did not want to speak to the police (48 R.R. 260).

(Am. Pet. Br. at 59.)

As discussed earlier, Murphy must show that trial counsel failed to make a valid objection that would have prevented the admission of prejudicial evidence.

See Clark, 19 F.3d at 966. Further, counsel's decision whether to challenge admission of evidence is a matter of trial strategy. *See Morales*, 714 F.3d at 305. Murphy has not shown that an objection would have prevented the admission of evidence, much less that counsel's decision to not object was an unreasonable trial strategy.

A prosecutor is not generally permitted to use a defendant's silence as evidence of his guilt. *See Griffin v. California*, 380 U.S. 609, 615 (1965). Also, once an accused is informed of his right to remain silent, the prosecutor may not use evidence that the accused later exercised his right to remain silent as evidence of his guilt. *See Doyle v. Ohio*, 426 U.S. 610, 619 (1976). When a defendant contests the voluntariness of his confession, however, the prosecutor may, and indeed must, introduce evidence showing that the accused knowingly and voluntarily waived his *Miranda* rights..

> The waiver inquiry "has two distinct dimensions": waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."

Berghuis v. Thompkins, 560 U.S. 370, 382-83 (2010) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Supreme Court found that a person's "right to cut off questioning" to be a critical safeguard in determining whether a waiver of *Miranda* rights is voluntary.

> Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting.

Id. at 103-04. Therefore, the fact that the officers respected Murphy's decisions regarding when to allow and when to cut off questioning supports the voluntariness of Murphy's confessions.

Murphy has not shown that the purpose of the prosecutor's questioning was to use Murphy's silence as evidence of his guilt. The prosecutor used Murphy's confessions to do that. Instead, this evidence appears intended to show that the officers would have respected, and did respect, Murphy's exercise of his rights under *Miranda*, and therefore did not coerce Murphy. Because this evidence was relevant to the issue of the voluntariness of Murphy's confession and waiver of *Miranda* rights, it appears to have been admissible at trial. Murphy has not shown that an objection to this evidence would have prevailed.

Even if an objection would have prevailed, however, Murphy has not provided any reason to believe that trial counsel made anything other than a reasonable strategic decision to allow the evidence. In fact, Murphy's own questioning of this officer attempted to show to the jury that the police did not know, and still do not know, important facts such as where the offense

occurred. He also used this evidence to argue that the prosecution had failed to prove that venue was proper in Dallas County, presented the issue to the jury, and raised it as an issue in his twelfth point of error on direct appeal. *Murphy v. State*, 112 S.W.3d at 603-604.

The failure to make a meritless objection cannot establish ineffective assistance of counsel. *See Clark*, 19 F.3d at 966. But even if it could, reasonable strategic reasons appear in the record to support trial counsel's decision to allow this evidence before the jury. If this portion of the claim were not procedurally barred, it would be denied for lack of merit.

2. Police Opinion Testimony

Murphy complains that trial counsel opened the door to police opinion testimony that he was not telling the truth. (Am. Pet. Br. at 60-61.) He contends that trial counsel's question to Detective Myers about whether he thought Murphy was telling the truth at one point was ineffective assistance because it allowed the prosecutor to ask Myers if he thought Murphy was lying at another time. Respondent points out that trial counsel's questioning showed not merely Murphy's truthfulness, but his remorse and cooperation with the police, which had a value beyond whether he was always truthful with the police. (Ans. at 97-98.)

As discussed above, Murphy's trial counsel ultimately sought to prove that he was cooperative with the police and remorseful. (59 RR 104.) Trial counsel also sought to show that the prosecution did not know

where the offense occurred and would not be able to show that venue was proper in Dallas County, Texas, despite repeatedly asking Murphy and driving him around potential locations. (48 RR at 241-44.) These strategies were served by getting the lead detective in charge of the case to admit that he thought Murphy was cooperative and telling the truth when he took him to these locations, but that despite their best efforts, they still didn't know. (48 RR at 244-45.) Trial counsel argued about each of these efforts to find out where the offense occurred to prove venue, and the prosecutor still couldn't prove that. (52 RR at 28-30.) Counsel also argued that they did not find the location of the offense because they did not take Murphy outside of Dallas County. (52 RR at 28-29.) This revealed not only the importance of the police not knowing the location of the offense to prove venue, but also highlighted Murphy's cooperation with multiple investigative efforts against him. These points would ultimately appear to help Murphy's defense in both stages of the trial.

Again, Murphy has not provided any reason to believe that trial counsel did not make a reasonable strategic decision, which is suggested by the record. Murphy has also not shown that the result of either stage of the trial would have been different. Therefore, he has not proven either prong of *Strickland*. If this portion of the claim were not procedurally barred, it would be denied for lack of merit.

3. Failure to Object to Argument

Murphy complains that trial counsel failed to object to the argument that the jury had to acquit petitioner of capital murder before it could consider the lesser included offenses. (Am. Pet. Br. at 61-64.) Respondent argues that the case authority relied upon by Murphy to complain that the prosecutor's argument was objectionable was not issued until 2009, eight years after Murphy's trial, that at the time of trial, the state of the law was that the argument was permissible, and that since we are to measure counsel's conduct at the time it occurred, trial counsel could not be found ineffective for failing to make a meritless objection. (Ans. at 99-102.) Murphy responds that the law at the time of trial was essentially the same in this respect. (Reply at 24.)

The jury instructions in Murphy's case charged capital murder and the lesser included offenses of murder and manslaughter. It instructed the jury that if they found the evidence beyond a reasonable doubt for a higher offense that they will find the defendant guilty of that higher offense, but "[i]f you do not so believe, or if you have a reasonable doubt thereof, you will next consider whether the defendant is guilty of" a lesser offense, and after the least offense charged, to find the defendant not guilty. (1 CR 181-182.) During the closing arguments, the prosecutor argued,

> Now, when you're looking at the Court's charge, ladies and gentlemen, there is something that's called the application paragraphs. And they start on page 13, and it

> starts with capital murder. That is the first offense you are to consider. Only if you do not believe the State has proven it beyond a reasonable doubt do you go to one of the lesser included offenses. The two lesser included offenses that are contained in this Court's charge are murder and manslaughter.

(52 RR at 17.)

Strickland requires that counsel's performance be evaluated "from counsel's perspective at the time." 466 U.S. at 689. This requirement counters the "natural tendency to speculate as to whether a different trial strategy might have been more successful." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). This Court must apply this "rule of contemporary assessment of counsel's conduct." *Id.*; *see also Westley v. Johnson*, 83 F.3d 714, 723 (5th Cir. 1996) ("The deficiency prong of *Strickland* is judged by counsel's conduct under the law existing at the time of the conduct.").

Murphy complains that the prosecutor argued that the jury had to "acquit" the defendant of the higher charge before considering the lesser charge. (Am. Pet. Br. at 61, 62.) Although the prosecutor's argument did not include that term, the CCA in *Boyett v. State*, 692 S.W.2d 512 (Tex. Crim. App. 1985), found that jury instructions should have included the term "acquit" in the sequential consideration of lesser-included offenses.

> We agree with appellant that the charge given in the instant case should have more explicitly instructed the jurors that if they did not

> believe, or if they had reasonable doubt of appellant's guilt of the greater offense, ***they should acquit appellant and proceed to consider whether appellant was guilty of the lesser included offense***. *See* 8 S. Willson, Criminal Forms Ann., Chapter 93 (Texas Practice 1977). If we were not reviewing this charge under a fundamental error standard, such error might well be reversible. However, the instruction given, although not a model charge, essentially instructed the jurors to acquit, without specifically using the word "acquit", by stating that if the jurors had a reasonable doubt as to the guilt of appellant to the greater offense, they should next consider the lesser included offense.

Boyett, 692 S.W.2d at 515-16. This suggested support for the type of argument made by the prosecutor, and at least one Texas appellate court so interpreted *Boyett.*

In *Harris v. State*, 287 S.W.3d 785, 790 (Tex. App. 2009), the appellate court upheld a jury charge "instructing the jury to agree unanimously to acquit appellant of manslaughter before determining whether appellant was guilty of the lesser-included offense of criminally negligent homicide." *Harris* was abrogated by the CCA in *Barrios v. State*, 283 S.W.3d 348, 353 (Tex. Crim. App. 2009), which criticized the use of the word "acquit" as "inartful," and interpreted *Boyett* differently and in the manner now being argued by Murphy.

In the instant case, the prosecutor's argument does not include the term "acquit" or expressly state that the jury must unanimously acquit of the higher charge before considering the lesser. Even so, such an argument would not appear to have obviously been prohibited by the law as it existed at the time of Murphy's trial. But even if trial counsel was deficient in failing to object, Murphy has not shown prejudice. He makes no argument that the actual jury charge was incorrect, and the state court would presume that the jury followed its instructions. *See Hutch v. State*, 922 S.W.2d 166, 170 (Tex. Crim. App.1996); *Ex Parte Damaneh*, No. WR-75134-01, 2011 WL 4063336 (Tex. Crim. App. 2011).

Murphy has not shown that the prosecutor's argument was clearly contrary to the law as it existed at the time, and that trial counsel performed deficiently in failing to object. But even if trial counsel was deficient in failing to object, Murphy has not satisfied the prejudice prong of *Strickland.* If this portion of the claim were not procedurally barred, it would be denied on the merits.

D. Excusal of Venireperson for Cause

In his fourth claim, Murphy contends that he was deprived of his rights to due process under the Fourteenth Amendment when the trial court excused venireperson Alena Treat for cause. (Am. Pet. Br. at 65-70.) Respondent asserts that the state court reasonably denied this claim. (Ans. at 103-110.)

Murphy complained that Treat was improperly excused in violation of *Witherspoon v Illinois*, 391 U.S. 510, 512 (1968), and *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). (Am. Pet. Br. at 69.) The CCA found,

> During voir dire, Treat stated that her understanding of the phrase "criminal acts of violence" meant "the same type of crime" as the capital murder that the defendant would have been convicted of in the guilt phase. Treat maintained that the State would have to prove that the defendant would commit or attempt to commit another murder in order to prove future dangerousness. When questioned by the trial court, Treat stated that intentionally causing a person to become mentally disabled by giving them a drug that would put them into a coma would also rise to the level of a criminal act of violence but conceded later that even these circumstances essentially amounted to an attempted murder.

Murphy, 112 S.W.3d at 597. Murphy does not appear to disagree with these facts, but argues that there was no "principled reason" for the CCA to rule that the potential juror was excused in violation of the state statute but not in violation of *Witherspoon* and *Witt*. (Am. Pet. Br. at 69.)

The Supreme Court in *Witherspoon* held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.

391 U.S. at 522. In *Witt*, the Supreme Court clarified *Witherspoon* and held that a prospective juror may be excluded for cause because of his or her views on capital punishment when "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" 469 U.S. at 424.

The CCA explained that *Witherspoon* and *Witt* were not violated was because the potential juror was not excused based on her views regarding the death penalty but because of her interpretation of the statutory language.

> Treat was excluded in this case because her own definition of the phrase "criminal acts of violence" would require evidence that appellant committed or attempted to commit other murders. While the phrase at issue is embedded within our capital death penalty provision which itself is continually assessed for its ability to hold up against federal constitutional standards, the wrongful elimination of a juror for establishing her own definition of that phrase does not implicate *Witherspoon/Wainwright.* Treat harbored no general opposition to the death penalty. She was not excluded because her views on capital punishment in general would prevent or impair her performance.

Murphy, 112 S.W.3d at 599.

The Court agrees with the CCA's reasoning, but even if it didn't, Murphy has not shown this

adjudication to be unreasonable. Under § 2254(d)(1), "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fair-minded jurists could disagree' on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Murphy has not sustained his burden to show the state court's adjudication to be either contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, or one that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. Therefore, he has not overcome the AEDPA deference required under § 2254(d). Murphy's fourth claim is DENIED.

E. Questions During Jury Selection

In his fifth claim, Murphy contends that he was deprived of his his [sic] Sixth Amendment right to trial by an impartial jury when the trial court refused to allow him to question the potential jurors regarding victim impact and character evidence. (Am. Pet. Br. at 70-74.) Framing it as a due process complaint, Respondent argued that the trial court did not abuse its broad discretion in limiting the questioning during jury selection. (Ans. at 112-14.) Specifically, because the sought questions did not pertain to issues of racial prejudice or pretrial news coverage, Murphy has not shown the state court's application of Supreme Court

precedent to be unreasonable or that he was deprived of a fair trial. (Ans. at 113-14.)

Murphy asserts that he raised this as a point of error on direct appeal. (Am. Pet. Br. at 71.) The CCA set forth the facts in its opinion as follows:

> In a pretrial hearing, appellant sought permission from the trial court to ask prospective jurors the following two questions:
>
> > Would victim character testimony cause you to reduce the State's burden of proof on Special Issue Number 1?
> >
> > Do you promise the Court that you would not do so?
>
> The State objected on the ground that the questions sought commitments from the jurors. The court sustained the State's objection. Appellant argues that his questions simply inquired whether prospective jurors would hold the State to its burden of proof notwithstanding the presence of evidence of the victim's character.

Murphy, 112 S.W.3d at 596. Special Issue Number 1 asks the jury about future dangerousness. Murphy acknowledges that victim impact and character evidence is relevant to the mitigation special issue but argues that it is not relevant to the future dangerousness special issue because he and the victim were strangers. (Am. Pet. Br. at 73.)

In denying this point of error, the CCA reasoned that the trial court did not abuse its discretion in

denying Murphy's request because the proposed questions were potentially misleading or confusing. The request did not provide the jury with the proper contextual information and suggested that the standard of proof could change based on the type of evidence presented.

> The trial court did not abuse its discretion in disallowing the questions. Appellant did not state how "victim character testimony" would be defined nor did he state whether or not venirepersons would be informed of this area of law before being asked such questions. *Cf. Chambers v. State*, 903 S.W.2d 21, 29 (Tex.Crim.App.1995) (stating venireperson not shown biased or prejudiced against the law unless the law is first explained to them). A proper explanation of the law is essential before asking a question upon which a challenge for cause due to bias against the law might be based. *See id.* Prospective jurors would need to be informed that the standard of proof by which the State must prove its case remains constant; it may not be increased or reduced depending upon the presentation of a certain type of evidence. In addition, because the standard of proof by which the State must prove its case is not affected by the presentation of any certain type of evidence, the trial court could reasonably have concluded that the questions would be confusing or misleading.

Murphy, 112 S.W.3d at 596.

Thus, the CCA opinion did not endorse a refusal to allow counsel to ask potential jurors their views about any particular subject, such as victim impact or character evidence, but simply required counsel to present their proposed questions in a proper context and not in a potentially confusing or misleading manner. The state court required counsel to precede questions about whether a potential juror would follow the law with an explanation of the law in question, citing its rule that "a venireperson is not shown to be biased or prejudiced against the law unless that law has been explained to them." *Chambers v. State*, 903 S.W.2d 21, 29 (Tex. Crim. App. 1995). Further, the CCA observed that the questions were potentially confusing or misleading because they suggested that "the standard of proof by which the State must prove its case" could "be affected by the presentation of any certain type of evidence." *Murphy*, 112 S.W.3d at 596.

Before this Court, Murphy has not overcome these bases for the CCA's ruling. Regarding Murphy's failure to include the proper contextual information in his proposed questions, he simply argues that the CCA should have assumed that the proper contextual information would have been provided because it had apparently been provided for other unidentified questions.[7] (Am.

[7] Murphy's arguments reverse the burden. Murphy argues that the CCA should have found that the trial court abused its discretion not because the necessary information was provided to the trial court, but because there was "no factual basis" for these state courts to conclude that the necessary information would not eventually have been provided for these questions if they had been allowed. (Am. Pet. Br. at 74.) And Murphy complains that he

Pet. Br. at 74.) Murphy does not, even now, provide the required information or show how the suggestion that the burden of proof could change would not be confusing or misleading to the potential jurors. Instead, his argument relies upon speculation about what would have happened if the questions had been allowed.

Respondent's argument also reaches a potential federal issue that was not decided by the CCA, which is whether the trial court could have prohibited questioning on victim impact or character evidence. Respondent points out that Murphy has not cited any Supreme Court case addressing this specific issue and suggests that there is none. Respondent argues that because the only Supreme Court precedent outside of racial or publicity matters are only of the most general type, this Court could not find that the CCA opinion was an unreasonable application of any clearly established federal law as determined by the Supreme Court under § 2254(d)(1). While this argument may be correct, it is not necessary to address it because the CCA did not reach that issue. Instead, it decided the point of error as inadequately presented because of the absence of necessary contextual information. This would be a procedural matter, a matter of state law, and "it is not the province of a federal habeas court to reexamine state-court determinations on state-law

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should not have been required to explain how victim impact and character evidence would be defined or how they would explain the law to the veniremen until after the trial court decided to allow the potentially confusing questions.

questions." *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991).

In this case, Murphy does not point to anywhere in the record where he set forth the proper contextual basis at trial for asking the actual questions made the basis of his complaint to the CCA. He has not shown that the CCA's decision unreasonably applied federal law or was based on an unreasonable determination of the facts based on the record before the state court. Therefore, he has not satisfied the requirements of § 2254(d). Accordingly, Murphy's fifth claim is DENIED.

VI. Request For Evidentiary Hearing

Murphy requests an evidentiary hearing on his claims of ineffective assistance of trial counsel, which are presented in his second and third grounds for relief. (Am. Pet. Br. at 75; Reply at 28.) This Court has discretion to grant an evidentiary hearing if one is not barred under § 2254(e)(2). *See Schriro v. Landrigan*, 550 U.S. 465, 468 (2007). In exercising that discretion, the Court considers whether a hearing could enable petitioner to prove the petition's factual allegations which, if true, would entitle him to relief. *Id.* at 474. The Court also must consider the deferential standards which limit the Court's ability to grant habeas relief. *Id.*

Murphy argues that a hearing is required because the state court did not conduct a hearing on these claims even though he requested it. (Am. Pet. Br. at 27;

Reply at 16-25.) Murphy also argues that these claims come within the exception to bar created in *Martinez*, and that this Court should review these claims *de novo*, requiring an evidentiary hearing to receive testimony on matters such as trial counsel's strategy. (Reply at 8-16.) The United States Court of Appeals for the Fifth Circuit has declined to hold that *Martinez* mandates an evidentiary hearing or opportunity for evidentiary development in federal court. *See Segundo v. Davis*, ___ F.3d ___, 2016 WL 4056397, at *3-4 (5th Cir. July 28, 2016). Instead, the narrow exception created in *Martinez* "merely allows" federal merits review of a claim that otherwise would have been procedurally defaulted.

"Reading *Martinez* to create an affirmative right to an evidentiary hearing would effectively guarantee a hearing for every petitioner who raises an unexhausted IATC claim and argues that *Martinez* applies." 2016 WL 4056397, at *3. And although the cause and prejudice inquire [sic] is fact-specific, that does not entitle habeas petitioners to evidentiary development, particularly when the record before the court is sufficient to show that the claims do not have any merit. 2016 WL 4056397, at *4. In light of the record and this Court's own review of the merits of these claims, the request for an evidentiary hearing is denied.

VII. CONCLUSION

The Court denies Murphy's amended petition for a writ of habeas corpus.

In accordance with Federal Rule of Appellate Procedure 22(b) and 28 U.S.C. § 2253(c), and after considering the record in this case, the Court denies Murphy a certificate of appealability because he has failed to make a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); 28 U.S.C. § 2253(c)(2). If Murphy files a notice of appeal, he may proceed in forma pauperis on appeal.

SIGNED January 23, 2017

/s/ David C. Godbey
David C. Godbey
United States District Judge